
U.S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office & Courthouse - Room 507
Post Office Square
Boston, MA 02109

Date: June 9, 1999
Case No. 1998-ERA-19
File No. 6-0030-98-803

IN THE MATTER OF:

Joe Gutierrez,
Complainant

v.

Regents of the
University of California, Respondent

APPEARANCES:

Carol Oppenheimer, Esq.
For the Complainant

Ellen Cain Castille, Esq.
For the Respondent

Before: DAVID W. DI NARDI
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. §5851 (hereinafter "the Act" or "the ERA"), and the implementing regulations found at 29 C.F.R. Part 24 and Part 18. Pursuant to the Act, employees of licensees of or applicants for a license from the Nuclear Regulatory Commission (hereinafter "the NRC") and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The following abbreviations shall be used herein: ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Complainant's Exhibit and EX for a Respondent's Exhibit.

On November 21, 1997, Joe Gutierrez (Complainant herein) filed a complaint of retaliation against Los Alamos National Laboratory (LANL or the Laboratory). LANL is run by the Regents of the University of California for the Department of Energy (DOE). The Complainant, an internal assessor employed by LANL, alleged that LANL added negative comments to his performance assessment and that he received an inadequate pay increase in 1997. (ALJ EX 1) The complaint was referred to the Office of Administrative Law Judges under cover of letter dated February 27, 1998. (ALJ EX 4) A hearing was held before the undersigned from January 4, 1999, through January 8, 1999, in Santa Fe, New Mexico. (ALJ EX 17) All parties were present, had the opportunity to present evidence and to be heard on the merits.

Post-Hearing Exhibits

ALJ EX 21[1]	Letter from this Office to S.R. Skaggs, Ph.D., regarding his January 5, 1999 letter	01/19/99
CX 39	Letter from Complainant's counsel dated January 13, 1999, regarding the deposition of Dennis Derkacs	01/21/99
EX T	Letter from Respondent's counsel dated January 25, 1999, regarding the taking of the deposition of Dennis Derkacs	01/25/99
EX U	Notice of Deposition of Dennis Derkacs	01/29/99

EX V	Letter from Respondent's counsel dated March 4, 1999, with	03/08/99

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EX W	February 8, 1999, deposition of Dennis Derkacs attached	03/08/99
CX 40	Complainant's Post-Hearing Brief	03/24/99
EX X	Respondent's Post-Hearing Brief	03/25/99
EX Y	Respondent's Post-Hearing Brief Regarding Damages	04/09/99

The record was closed on April 9, 1999, as no further documents were filed.

The following are the uncontested facts (ALJ EX 18):

1) Los Alamos National Laboratory (LANL) is operated by the University of California for the Department of Energy (DOE).
2) Complainant is an employee of the University of California at the Los Alamos National Laboratory.
3) At all applicable times, Complainant was and continues to the present to be employed as an internal assessor in LANL's Office of Audits and Assessments (AA) specifically in group AA-2.
4) Complainant identifies protected activity as various disclosures he made to DOE, LANL management, the media, the Federal court, and to New Mexico's congressional delegation between 1996 and 1997 and to an affidavit he provided to Citizens Concerned for Nuclear Safety (CCNS) in 1996.
5) Complainant received a 2.75% raise for FY '98.
6) Katherine Brittin became Director of Audits and Assessments in October 1994. James Loud became Group Leader of Audits and Assessments Group 2 in March 1997. Laboratory policies identified in Complainant's and Respondent's exhibits below are true and accurate policies of the Los Alamos National Laboratory.

I. Summary of the Evidence

A. Background

Joe Gutierrez is employed by LANL as an assessor in the independent internal assessment (AA-2) group. (TR 53) This position entails the evaluating, independent of line management, of the actual performance of programs, organizations and processes of the facility, as well as worker behavior and other personnel behavior that impacts on those programs and organizations. (TR 53) Complainant has been employed at LANL since May of 1989, and he has been an assessor since October of 1992. (TR 54) From 1989 through 1992, Complainant's position was that of standards coordinator under the Engineering Division. (TR 54-55)

Katherine Brittin, the Director of the Audits and Assessments Office at LANL (TR 882), explained that the purpose of AA-2 is to provide management with independent and objective evaluations of the status of the environmental, safety, health, security and quality assurance programs within the Laboratory. (TR 825)

Dennis Derkacs was the group leader of AA-2 through February of 1997. (EX W at 4-5) His duties included supervising the employees in the group, making assignments and managing the Internal Assessment Program. (EX W at 5-6) James Loud took over the role of group leader of AA-2 in March of 1997. (TR 974)

There are three team leaders in the AA-2 group: James Griffin, Nathaniel King and John Frostenson. (TR 519-521, 575-577, 714) The duties of a team leader include scheduling the assessment, making the announcements, setting the overall objectives, selecting the assessors, conducting team meetings, interacting with the assessed organizations and preparing a readable report that can be used by management. (TR 520, 576-577, 716-718) After the field work is done, each team member comes with a write-up of what they have found, and they go through a "murder board."[2] (TR 581, 529-530) After the "murder board", the team leaders take the documentation and prepare the assessment report itself. (TR 581) The report is next reviewed by the group leader, and then it is forwarded to the Director of Audits and Assessments. (TR 531) Editors are used to maintain proper format, grammar and sentence structure. (TR 532, 722)

According to Mr. Griffin, Mr. King and Mr. Frostenson, there is an expectation that assessments are to remain internal documents to the Laboratory. (TR 544, 587, 723-724) They explained that, although assessments are not marked "internal use only" or "confidential", it is expected that they will be kept as internal documents. (TR 544-545, 587-590, 723-724) Neither Mr. King nor Mr. Griffin are aware of any written policy explaining that assessments are for internal use only. (TR 608-609, 570) It is also Ms. Brittin's expectation that assessment reports are for internal distribution only.[3] (TR 828-836)

Mr. Griffin, Mr. Frostenson and Ms. Brittin explained that there may be safety, logistical or security reasons why the group may not be able to enter a particular facility during an assessment. (TR 524-526, 720, 827) Mr. Griffin stated that if the group is denied access to a certain area, they will have the group leader speak with the group leader of the facility to be evaluated. (TR 526) If that does not resolve the problem, they "elevate it" to the division directors. (TR 526-527, 737) Ms. Brittin stated that she never had an issue pertaining to access that could not be resolved. (TR 828)

Mr. King, Mr. Frostenson and Mr. Loud indicated that if there were imminent safety issues uncovered, they should immediately be brought to the attention of members of the assessed organization. (TR 606, 718, 1165-1166) This way, the members of the assessed

organization can begin addressing those issues before the assessment report comes out. (TR 606)

According to Complainant, a process was established whereby he would "co-manage the assessment." (TR 1129) Complainant stated that he co-managed the assessments in relation to the quality assurance topic as it related to the assessment. (TR 1129) He further explained that he assisted Mr. Griffin in the planning and scheduling. (TR 1130) He, along with Mr. Griffin, would introduce the quality assurance topic and address the quality assurance aspects of the assessment. (TR 1130) He would also make a special out-brief specifically just for the topic of quality assurance. (TR 1130) Complainant stated that Mr. Griffin gave him full authority to deal with the QA part of the assessment. (TR 1120)

However, Mr. Derkacs stated that he never appointed anybody, including Complainant, an assessment co-team leader for an independent assessment. (EX W at 11-13) He stated that no one else would have the authority to appoint a co-team leader while he was the group leader. (EX W at 13) However, Mr. Derkacs did explain that QA audit leader would be a fair term to use for Complainant, in connection with the RAB Audit Logs, but that was not the same thing as a team leader at LANL. (EX W at 24) Complainant had significant responsibilities because of his subject matter expertise in the area of quality assurance. (EX W at 22)

Complainant pointed out that the RAB Audit Logs, which provide evidence and documents the certification to the ISO 9000 quality requirements, indicate that he was the lead auditor on June 3, 1996, June 27, 1996, September 14, 1996 and October 7, 1996. (TR 184-185; CX 17) The logs were signed by Mr. Derkacs, who was Complainant's group leader at the relevant times. (TR 184-185) The logs also indicate that Complainant was a lead auditor on July 16, 1997, and it was signed by Mr. Loud, who was Complainant's group leader at that time. (TR 185) Complainant explained that the term "lead auditor" used in the RAB Audit Logs is equivalent to a team lead assessor in AA-2 parlance, and that the AA-2 logs should list him as a team leader for some of the assessments for which he is listed as a lead auditor in the RAB Audit Logs. (TR 348-349; CX 17)

Mr. Derkacs explained that the RAB Audit logs were to document Complainant's participation in audits and assessments so that he could be certified a QA audit leader. (EX W at 15; CX 17) He further explained that Complainant had a leadership role for QA, but he was not a team leader. (EX W at 19) According to Mr. Derkacs, for AA-2 purposes, Complainant was the subject matter expert for quality assurance. (EX W at 19) For the purpose of the RAB certification, Complainant had the total responsibility for the QA. (EX W at 19-20). Mr. Derkacs explained that by signing the RAB Audit Logs, he was saying that, for purposes of that organization, Complainant was fulfilling a role that was similar enough to what they were looking for. (EX W at 35)

B. BUS Assessment

Complainant received the Business Operations Division (BUS) assessment to lead in mid-1994. (TR 267; EX W at 7) He was assigned as the team leader to assess the status of the safeguards of the security program, the quality assurance program and the environmental program as applied to the division's operations. (TR 74) Complainant explained that for the two years preceding 1996, "the Laboratory had experienced what many considered an epidemic of events that were accidents."[4] (TR 75)

According to Complainant, the duties of a team leader are to coordinate the planning of an assessment, collect information, provide guidance to the team, coordinate the team in its interface with their respective organizations, and then prepare a report. (TR 268-269) He further explained that it is the team leader's responsibility to get to the point of drafting the report, next it would be subject to peer review, and from there "it was pretty much the editor who was responsible for the editing and getting that report edited" to the point where the group leader can send it out as a draft to the assessed organization. (TR 270-271)

Complainant stated that his report was ready to go out as a draft in the early part of 1995, but it was held back by Mr. Derkacs, who at the time was the group leader of AA-2.[5] (TR 270; EX W at 4-5) According to Complainant, Mr. Derkacs, informed the group that no reports would be going out without a person in authority reviewing it. (TR 270)

Complainant wanted to get the BUS assessment out because of the epidemic of accidents, and because he did not see any action from management to address the issue. (TR 1142) He stated that a closing conference would not have served the same purpose as the issuance of the final report. (TR 1142) He explained that the out-brief is to give the assessed individuals, and line management, a "heads-up." (TR 1143) He further explained that "soft issues", those relating to human behavior, large expenditures and coordination among a number of divisions, would require a detailed information that could only be provided by a final report that has verified data. (TR 1143)

Complainant's primary concern was in relation to applying "a configuration management/as-built program to activities, to maintenance and construction in particular." (TR 81) He explained that "configuration" means that the routing of any process or the installation of a structural element be known and depicted on drawings appropriately as it exists in the field. (TR 82) The "as-built" refers to the drawings and documents that relate to that work being kept updated to reflect the configuration as it actually exists. (TR 82) Complainant explained that because no configuration/as-built program was in effect, individuals were cutting through walls and floors and encountering electrical wires. (TR 82) He further explained that the need for as-built configuration design is not limited to the business office. (TR 1143-1144)

Ms. Brittin was contacted by Carol Smith, the customer[6] of the assessment, who stated that she was annoyed because it had been a long time since the assessment was done and no report had been produced. (TR 822, 840-841) Ms. Brittin contacted Mr. Derkacs to find out about the report. (TR 841) Mr. Derkacs provided a copy of the report dated January 10, 1996, which Ms. Brittin did not think was well written. (TR 842-844; EX H-19) She also found no obvious health and safety issues in the report. (TR 851, 916; EX H-19) Ms. Brittin read through the report, tried to express her concerns, and sent it back to Mr. Derkacs. (TR 844) According to Ms. Brittin, Complainant had the principal responsibility for the report because he was the team leader. (TR 845) Drafts of the report were sent back and forth between Ms. Brittin and Mr. Derkacs. (TR 845)

Ms. Brittin was also contacted by James F. Jackson, the Deputy Director of the Laboratory, who wanted to find out if there was a report that was being held up. (TR 838) She informed him that when she got something she felt she could sign, the report would be released. (TR 838)

Complainant explained that he would receive comments from Mr. Derkacs or Ms. Brittin, and he would address them, and Mr. Derkacs and himself would address the resolution of the comments. (TR 276; CX 36; CX 37) Mr. Derkacs would then pass on the comments to Ms. Brittin, or Complainant would annotate it for Mr. Derkacs. (TR 276; CX 36; CX 37)

According to Complainant, on January 31, 1996, Mr. Derkacs called him into his office to discuss Complainant's salary increase notification. (TR 73) Complainant testified that Mr. Derkacs told him that he would be receiving only a 2.0 percent salary increase, and that the determination was predicated perhaps on the delay in getting out the BUS assessment.[7] (TR 74) Complainant responded to Mr. Derkacs in a memo dated March 22, 1996. (TR 75-76; CX 2) The memo stated, in relevant parts, as follows:

> I responded by stating that I did not accept the reason given since the issues and constraints that delayed the report were out of my control and the fact that I was not the only assessor experiencing these constraints. Please see attachment 1 for more detail on the constraints that have caused the delay in the issuance of the BUS Assessment. I elaborated on the fact that the underlying reason the report has been delayed is because of the extent of editing that has occurred from the many reviews of the report. In essence you and the Director of Audits and Assessments have continued to edit your own editing. Most importantly, I called to your attention the fact that what has been overlooked is the substance and significance of the topics the report tries to communicate. The perspective I gave you related to the several accidents that the Laboratory operations has experienced in the last two years. What has been overlooked is the fact that my reports have consistently pointed out the many deficiencies in the management of the Laboratories' "work process" and implementation of the "Quality Assurance Program". I pointed out the fact that the Laboratory may be vulnerable since the report has highlighted management ineptness that is a contributing factor to the occurrence of the

accidents and management has not demonstrated the necessary aggressiveness in correcting these noted shortcomings.

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You in turn responded by stating that we should not disclose to the public the information revealed by the assessments since this information can be considered privileged and confidential. I pointed out that Secretary O'Leary has announced that the Laboratory no longer operates under the veil of secrecy. Besides there are professional ethics, moral and legal issues that may impact us if we knowingly suppress potentially damaging and life threatening information.

(CX 2) According to Complainant, Mr. Derkacs was "very nervous" that he would go to the public with his concerns. (TR 77) Complainant sent a copy of the memo to Katherine Brittin, and to Mr. Jackson. (TR 79) Ms. Brittin did not respond to Complainant's memo. (TR 86, 837)

Ms. Brittin received Complainant's March 22, 1996 memo to Mr. Derkacs. (TR 917) She indicated that the memo did reference health and safety issues. (TR 917-919) However, Ms. Brittin noted that Complainant did not tie the health and safety issues to the findings he had in his report. (TR 920) Ms. Brittin did not discuss the health and safety issues with Complainant, although she did discuss them with Mr. Derkacs. (TR 920-921) Ms. Brittin explained that it is her job "to advise management about the state of the environmental, safety and health programs", and it is "management's job to ensure protection." (TR 922)

Ms. Brittin stated that if Complainant had major concerns about health and safety issues, she would expect him to raise them immediately with the Business Operations Division. (TR 863) She also reiterated that if Complainant had significant health and safety problems, he should have raised them with her. (TR 917)

On April 18, 1996, Ms. Brittin sent memos to Complainant and Mr. Derkacs indicating that she was disappointed in the way the report had gone because it did not appear that they were addressing her comments.[8] (TR 277-278, 845-848; EX Q, EX R) Ms. Brittin explained that she was not trying to change the contents of the report, but she was concerned that Complainant had not expressed his thoughts very well. (TR 848-849)

Mr. Frostenson stated that he was asked by Mr. Derkacs in June of 1996 to help in the rewrite of the BUS assessment report. (TR 770) Mr. Frostenson was to try and answer Ms. Brittin's comments. (TR 771) Ms. Brittin's concerns were that the findings be "stated clearly and supported." (TR 773)

According to Mr. Frostenson, when he spoke with Complainant about the BUS assessment, Complainant told him that he did not want anything to do with it and he did not

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care if it ever got out. (TR 772) Mr. Frostenson stated that he did not change the factual content of the report, but that he reorganized the material in the report so that it was understandable. (TR 773-774) He believed he included all of Complainant's findings and observations, and that he did not water down Complainant's findings. (TR 774) Mr. Frostenson did not recall any particular significant safety concerns in the report. (TR 777)

At the point Mr. Frostenson thought that the report would be acceptable to Ms. Brittin, he asked Complainant to go through the report with him. (TR 775) According to Mr. Frostenson, Complainant was reluctant to assist. (TR 775-776) Complainant explained that, through the editing process, the substance of the report changes because "either there's not enough explanation to capture the true reality of the finding that we're trying to portray or in the course of a two-year period you have so much iteration in the writing that after a while it doesn't become my finding." (TR 279; TR 87)[9]

Mr. Frostenson stated that the rewrite took approximately a week and a half. (TR 777) Complainant was not called into any meetings with Mr. Frostenson and Ms. Brittin when Mr. Frostenson was rewriting the BUS assessment. (TR 799, 850) The BUS assessment report was finally distributed on July 9, 1996. (TR 277, 776, 850; EX H; CX 4)

In early 1996, Complainant spoke with Herman Le Doux, the Deputy Area Manager for the Los Alamos Area Office of the Department of Energy, about his safety concerns. (TR 83; TR 464) Complainant did so because he did not feel that he was going to get a response to his March 22, 1996 memo.[10] (TR 83) According to Mr. Le Doux, Complainant was concerned about his inability to get a report, dealing with an addition at the TA-55 plutonium facility, out of Audits and Assessments. (TR 464-465) Specifically, Complainant was concerned with the potential for a leak between concrete placements. (TR 465) Mr. Le Doux explained that the concerns revolved around quality assurance with the concrete. (TR 475) Mr. Le Doux did not recall discussing the BUS assessment with Complainant. (TR 466)

Mr. Le Doux committed to Complainant that he would get in touch with Mr. Jackson, and inform him of his conversation with Complainant. (TR 84,469) According to Mr. Le Doux, he did so inform Mr. Jackson, "[w]ithin a day or so." (TR 469) Specifically, he told Mr. Jackson that he met with Complainant, that Complainant had some concerns about his inability to get his report through Audits and Assessments, and that Complainant had some concerns about concrete placement. (TR 470) According to Mr. Le Doux, Mr. Jackson committed to looking into it, although he never heard back from Mr. Jackson. (TR 470) However, after following up on a conversation, Mr. Jackson indicated to Mr. Le Doux that LANL had followed up on Complainant's concerns. (TR 470) Mr. Le Doux did not provide anything in writing to Complainant, although he did tell Complainant that he had spoken with Mr. Jackson.[11] (TR 471)

C. Statement of Joe Gutierrez

Complainant received LANL's whistleblower policy in July of 1996. (TR 96; CX 5; EX C-24) He considered whether it was time to "blow the whistle" given that there did not "appear to be a mechanism in the Laboratory that [was] working." (TR 96) Complainant was also concerned about how effective the policy was going to be. (TR 97)

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Siegfried S. Hecker, the Laboratory Director, issued a memo dated July 15, 1996. (CX 6) The memo stated, in relevant part, as follows:

> The purpose of this memorandum is to reiterate and clarify the message that I presented to you this morning in our LLC meeting. As a result of the serious safety incident last week, I am instituting "Safety First Days" at the Laboratory. The features of "Safety First Days" were outlined in the viewgraph hardcopies that were distributed to you this morning. In this memorandum I want to focus specifically on two of the key elements: temporary suspension of work pending internal safety reviews and obtaining a clear and formal commitment to safety from all workers at this site.
> By 8:00 a.m. Tuesday, July 16, 1996, all work at the Laboratory will be temporarily suspended. We are not shutting down our facilities but rather pausing so we can step back and reexamine the way we all approach our work. During this suspension, all on-site workers (University of California employees and all subcontractor employees) will review the safety of their current operations with their supervisors. This review will include work planning, hazards analysis, safety procedures, and training. The key questions are: Are necessary policies and procedures in place for the safe performance of current operations? Are workers properly trained to carry out these procedures? Are workers actually following procedures they are trained to use? Please note that this temporary suspension is not intended to determine the adequacy of procedures for current operations but rather to ensure that procedures exist and are being followed.

(CX 6)

On July 15, 1996, Complainant, as well as all other individuals at LANL, were asked to sign an Employee Safety Commitment ("ESC") form. (TR 100) On July 17, 1996, Complainant sent a memo to Mr. Frostenson setting forth his concerns with the ESC. (TR 100; CX 7) Complainant would not sign the ESC without annotating it, because in his opinion, it required that he take responsibility not only for himself, but also for his associates and line management. (TR 101) Complainant felt "uncomfortable" with signing the ESC as it did not address the responsibilities of management to ensuring workplace safety. (TR 101) Complainant referenced the configuration/as-built problem and the fact that there was no QA program in place. (TR 101-102) According to Complainant, Mr. Frostenson made a comment that if he did not sign the ESC, he would be fired. (TR 286)

Mr. Derkacs responded to Complainant's memo in a memo of his own dated July 22, 1996. (TR 103; CX 8) He indicated that Complainant's questions deserved review,

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and he would forward those questions to Ms. Brittin. (TR 104) Complainant has not heard from Ms. Brittin with regards to the ESC. (TR 104)

On July 29, 1996, LANL issued a news release entitled "LABORATORY ANNOUNCES COMPLIANCE WITH CLEAN AIR ACT". (CX 9) The news release announced that LANL had notified the DOE that it could demonstrate compliance with radioactive air emissions requirements of the Clean Air Act. (CX 9) Complainant first saw the news release on July 30, 1996. (TR 105) Based upon his knowledge of the configuration program and the overall quality assurance program at the Laboratory, Complainant found the claims being made by LANL to be deceptive. (TR 105-106) He felt "very concerned" and he also felt that there was a "compelling need to make things right in the public eye and for the public's benefit." (TR 106) Complainant felt that he "needed to blow the whistle." (TR 106)

The "last straw" that made Complainant decide to blow the whistle was an article that appeared which described the incident involving a graduate student who received an electrical shock while working at the Laboratory. (TR 106) According to Complainant, management indicated that they were starting to question the effectiveness of the audit and assessment function because they relied on them to provide information about problems. (TR 106-107) Complainant explained that from his past experience in the nuclear industry, "that told [him] that somebody was looking for a scapegoat and that scapegoat was the audit and assessment function." (TR 107) As the concerns related to the quality assurance program, Complainant felt that "it pointed the finger right back at [him] because [he] was the one individual in the Audit and Assessment Group that focused on assessing and evaluating the effectiveness of the quality assurance program across the Laboratory." (TR 107)

After accumulating information, Complainant decided he was on firm footing to blow the whistle. (TR 107-108) Complainant drafted a statement dated October 7, 1996, which set forth his concerns. (TR 108; CX 27) He tried to convey that many, if not all, of the problems could be attributed to the fact that an effective quality assurance program had not been implemented. (TR 122) Another related observation in the statement is that LANL had been informed in many ways about the potential problems that come about by not having a fully implemented effective quality assurance program. (TR 122) Complainant explained that quality assurance is applicable to the Clean Air Act activities. (TR 122) Complainant stated that there was a culture, behavior and attitude of individuals at LANL whereby they were not willing to embrace the QA requirements. (TR 124)

One of the Complainant's specific concerns he mentioned was that clerical people were doing the QA function at TA-21, the facility that processes Tritium[12] . (TR 127)

Furthermore, two technicians compiling air emissions data were not using the same methodology to calculate the emissions, and there was disagreement as to what was the correct methodology. (TR 130) Complainant also

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indicated that records for the emissions calculations for a complete year could not be located. (TR 131) Complainant had written an assessment for TA-21, dated March 28, 1995, which included a critique of the tritium air monitoring system. (TR 132; EX G) He also noted that there was a potential structural weakness with the plutonium facility, and that there was a potential for gas and/or liquid leakage. (TR 128-129)

According to Complainant, his concerns affected public health and safety because, through his assessments, he found problems with the configuration of the radionuclide monitoring system. (TR 1148) He explained that the "individuals responsible for those areas were unaware of the requirements of quality assurance as applied to those particular monitoring instruments and how to ensure that procedures were in place and prior to the use of monitoring equipment." (TR 1148) Complainant agreed that if there were a power outage because somebody bore through the wall, it could affect the monitoring of radionuclides that could escape to the public. (TR 1149)

After completing his statement, Complainant had it notarized, and then he delivered it to Citizens Concerned for Nuclear Safety (CCNS)[13] , and he mailed it to Senator Jeff Bingaman and Congressman Bill Richardson. (TR 139) He explained that, although the statement indicated that he was giving information to CCNS, the press and the New Mexico congressional delegation, he did not give a copy of the statement to the press. (TR 383) Complainant drew a distinction between the statement itself, which he did not provide to the press, and the information contained within it, which he expected the press would inquire into. (TR 383)

On August 27, 1996, Complainant received his performance assessment for the review period covering the time period of June 1, 1995, to May 31, 1996.[14] (TR 113-114; CX 16)

Also on August 27, 1996, Complainant signed a document entitled UC/DOE National Laboratories Code of Ethical Conduct for Los Alamos National Laboratory Audits and Assessments Office. (CX 16) The document was first presented to Complainant at the time of his performance assessment. (TR 308) Complainant signed the document, indicating that he would abide by the Code Of Ethical Conduct, "with the exception of items 2,3 and 4." (CX 16) Those items state as follows:

> 2. Exhibit loyalty in all matters pertaining to the affairs of the University of California, the Los Alamos National Laboratory, and the Audits and Assessments Office, and will not knowingly be a party to any illegal or improper activity.
> 3. Maintain independence in attitude and appearance on all matters which come under review, and refrain from entering into any activity which may be in conflict

with the interest of the University of California, the Los Alamos National Laboratory, or the Audits and Assessments Office, or which would impair or be presumed to impair their professional judgment in carrying out objectively their duties and responsibilities.

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4. Be responsible for ensuring due care to prevent improper disclosure of in-strict confidence or privileged information acquired in the course of their duties, and shall not use such information for personal gain, nor in a manner which would be contrary to law or detrimental to the welfare of the University of California, the Los Alamos National Laboratory, or the Audits and Assessments Office.

(CX 15) Complainant took issue with items two, three and four, because he believed the first commitment of the Laboratory and the University of California is to ensure public safety. (TR 310) He found the statements calling for loyalty in all matters to the University of California, LANL and the Audits and Assessments Office to be "very confining and limiting." (TR 311)

Complainant asked to speak with Congressman Richardson and Senator Bingaman after he sent them copies of his October 8, 1996 statement, but he did not receive a response. (TR 288) However, he also indicated that at some point, he did have an opportunity to speak with them about his concerns. (TR 289) Complainant did not personally give a copy of the statement to the Laboratory, and no one in line management ever discussed the statement with him. (TR 290-291)

Complainant considered Congressman Richardson and Senator Bingaman to be proper authorities to contact regarding his concerns, pursuant to the policy set out in the Administrative Manual.[15] (TR 367- 368; EX C-21) Complainant explained that he did go to DOE about his concerns, but that "basically nothing happened." (TR 368-369) He further explained that he was told that the DOE did not have the personnel to deal with his concerns, and that the DOE "would get to it when they got to it." (TR 369) Complainant was also concerned with the fact that DOE was a party in the CCNS suit. (TR 369) Complainant had similar concerns about going to the EPA. (TR 369)

Complainant explained that it would be his expectation that if he released a document stamped confidential, he would be called in to discuss the policy violation, and if the situation warranted, he could be fired. (TR 370-371) Complainant indicated that none of that happened. (TR 371)

According to Complainant, he never provided a copy of his October 7, 1996 statement to anyone other than Congressman Richardson, Senator Bingaman and CCNS. (TR 375) He explained that his intent was to "surface the concern [he] had to the public", and it was his expectation that by giving it to CCNS, he could get his concerns to the court. (TR 375-376) He also explained that he had raised his concerns on numerous occasions, but he was confronted by a "stone wall." (TR 376-377) Complainant felt that he had done all he could do. (TR 377)

James Coughlan, the LANL Program Director at CCNS, stated that Complainant contacted him sometime after July 30, 1996, and he met with Complainant "up to a half a dozen times." (TR 401) Mr. Coughlan explained that the substance of the meetings with Complainant "pertained to quality assurance programs at Los Alamos" in general, and specifically to "quality assurance programs relative to Clean Air Act compliance." (TR 402) He was informed by Complainant that "essentially because quality assurance is an integral part of Clean Air Act compliance and that those quality assurance programs were inadequate, that essentially the Laboratory was not in compliance with the Clean Air Act even after it claimed it was." (TR 402)

According to Mr. Coughlan, in April of 1996, Judge Mechem ruled that LANL was not in compliance with the Clean Air Act, and he directed the parties to negotiate. (TR 402) A settlement conference took place on October 28, 1996, before Judge DeGiacomo. (TR 404) At that time, CCNS submitted a document to Judge DeGiacomo, at his request, outlining their position. (TR 404) One of the attachments to that document was Complainant's October 7, 1996 statement. (TR 405; CX 27) Mr. Coughlan stated that he personally had no way of checking Complainant's accuracy before submitting Complainant's statement to Judge DeGiacomo. (TR 418) However, he did believe Complainant's statement was corroborated by the court ruling. (TR 421-422) Mr. Coughlan stated that, as far as he knew, nobody from CCNS distributed Complainant's statement. (TR 414)

With regards to Complainant's October 7, 1996 statement, Mr. Frostenson stated that, in his experience, QA assessors are not demoralized or reluctant to write up the true severity of their findings. (TR 780; CX 27; EX N) He also stated that neither himself, nor anybody on his team, has ever been reluctant to write up the true severity of their findings or downplayed the seriousness of operational deficiencies. (TR 780)

Ms. Brittin saw Complainant's statement, after it was faxed to her office from the Public Affairs Office, which had received it from a reporter. (TR 870) Ms. Brittin gave the statement a cursory reading, as she had personal matters to attend to, and she never discussed it with Complainant. (TR 871) However, she stated that she did briefly discuss it with Mr. Loud. (TR 871-872)

Ms. Brittin noted that in Complainant's statement, he claimed that he had written an assessment for TA 21 which included a critique of the tritium air monitoring system, that sat on the Director's desk for over a year. (TR 906; EX N; CX 27) Ms. Brittin indicated that the final assessment report for the assessment Complainant referred to went out on March 29, 1995, five months after she arrived at LANL. (TR 906-907; EX G)

Ms. Brittin stated that she did not have a concern with Complainant going to CCNS or being involved with the Clean Air Act lawsuit. (TR 961) She added that she would have a

concern if Complainant was "using our material if it's connected with a lawsuit." (TR 962)

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D. Santa Fe New Mexican Article

On October 28, 1996, Complainant sent an e-mail to Mr. Derkacs in response to concerns from line management at TA-21 regarding the validity and value of assessments provided by Complainant's assessment of the Tritium Science and Fabrication Facility (TSFF). (TR 361-362; CX 32; EX G) According to Complainant, during the stand down, line management found approximately one hundred and forty-four deficiencies. (TR 362) In the e-mail, Complainant explained that the reason those deficiencies were not detected by his assessment team was because "specifically we were not allowed to go into that room."[16] (TR 362) Complainant further explained that "when we did walk through that room we were told not to write up anything related to what we saw in that room." (TR 362) Complainant also noted that the QA people assigned to TSFF do not have the requisite training as required by LANL quality management and the Code of Federal Regulations. (TR 363)

Complainant was contacted by Keith Easthouse, of the *Santa Fe New Mexican*, a day or two before October 28, 1996. (TR 141) Complainant granted an interview because he had a "nagging concern" that the public was not being given adequate notice of the status of the problems of which he was aware. (TR 141) Complainant did not notify the Public Affairs Office, as required by AM 707, before he spoke with Mr. Easthouse.[17] (TR 238; EX C-16) Nor did he seek authorization to release information from his assessments to Mr. Easthouse. (TR 240)

On October 28, 1996, the *Santa Fe New Mexican* published an article entitled "Inspection system takes big cuts when lab works on safety". (CX 10; EX E) Complainant was quoted as stating that "[t]he internal audits and assessments process is not independent, nor is it functioning." (CX 10; EX E) Complainant explained that under a new approach, the Audits and Assessments Office would be limited to "administrative" evaluations. (CX 10; EX E) He also explained that it appeared inspectors would be limited to reviewing the evaluations of facilities provided by the managers of the facilities, a situation Complainant likened to the fox guarding the henhouse. (CX 10; EX E) The article also referenced Complainant's statement that he submitted to CCNS. (CX 10; EX E)

Although the article refers to Complainant as a "lab inspector", Complainant stated that he did inform the reporter that his official title was an assessor. (TR 222) He also stated that information relating to a June Laboratory meeting was not provided by him. (TR 223) Complainant explained that his allegations of defects in a concrete wall came from the assessment of the TA-55 plutonium facility. (TR 226) He also explained that his statement, that assessors[18] were not allowed in certain areas, related to the TA-21 facility.

(TR 228) Complainant explained that he addressed his concerns regarding access to Mr. Derkacs and Mr. Griffin, who was the team leader for that assessment. (TR 230) He did not take his concerns to Ms. Brittin, as the approach "has always been to follow the chain of command and to approach by administrative policies and address it through your immediate supervisor." (TR 231-232, 881)

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Complainant explained that he used information from the Gas Generation Matrix assessment in his statement to the newspaper that the WIPP[19] data was unreliable. (TR 1135-1136; CX 34) According to Complainant, the software that was being utilized for processing the data in the computer was found to be unreliable and ineffective. (TR 1132) He also indicated that the calibration records were not traceable to specifications or devices, and that the procedures for calibrating the pressure transducers in the install position were not available. (TR 1132; CX 34) Complainant explained that he based his statement on the results of "four or five experiments" in which he participated, wherein the experiment was assessed relative to the quality assurance program that was being applied. (TR 1136)

According to Complainant, after the article came out in the *Santa Fe New Mexican*, nobody in management made any reference to it. (TR 143; 242) The first time that anyone talked to Complainant about the newspaper article was when he reviewed his performance assessment in August of 1997. (TR 143-144)

Mr. Griffin read the article in the *Santa Fe New Mexican* when it first came out, and he stated that he was "angry" because he felt like his "whole group had been betrayed because we were under the impression that what we wrote in our reports and what we advised top management was proprietary information at least, to be shared only with the Lab management and within program managers at the Laboratory." (TR 534; CX 10; EX E) However, Mr. Griffin never spoke with Complainant about the article. (TR 565) Mr. Griffin felt that the article was "inaccurate" and it "reflected on our capability to determine what was important and whether it was the kind of information that should be allowed into the general domain." (TR 534) Mr. Griffin explained that there was an expectation of confidentiality. (TR 535)

Mr. Griffin felt the allegation, that inspection teams were not allowed access into certain areas because the Laboratory was trying to hide things, was not true. (TR 536) He explained that access has been denied only for operational and security reasons. (TR 536) Mr. Griffin also stated that there were some statements made by line managers that he felt were inaccurate because they gave the impression that Audits and Assessments were merely a watchdog group. (TR 537) He felt that this "degraded the effectiveness of our organization." (TR 537)

Mr. King read the article, and he was concerned that the statements being made were inaccurate. (TR 592; CX 10; EX E) Mr. King explained that "there was my feeling that

there was no substance to the allegations of the statements being made", and he did not "remember seeing substantive documentation to support them." (TR 593) Mr. King stated that, even if every statement in the article were true, he would have a similar reaction because he felt it was "something that the management needs to address not the newspaper." (TR 593) Mr. King stated that "[w]e're servants...we're not enforcers." (TR 593) He explained that "we discover information and we present it to

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the Laboratory for them to determine how best to handle that information." (TR 593-594)

At some point, Ms. Brittin did see the article in the *Santa Fe New Mexican*. (TR 872; EX E; CX 10) She was concerned that similar assessment materials were in the paper, that the assessments were considered for internal use only, and that assessors were giving press interviews which did not appear to have been through official LANL channels. (TR 873) She was also concerned that Complainant was quoted as saying that the internal audit and assessments process was not independent or functioning. (TR 873) Ms. Brittin explained that if the assessed organizations do not think the assessors can be objective and fair and give them a balanced perspective, then they will not rely on the reports. (TR 874)

E. Santa Fe Reporter Article

Complainant was next quoted in an article from the *Sante Fe Reporter* entitled "The Truth About the Stacks", which appeared in the January 15-21, 1997 edition. (TR 144; CX 11; EX D) Complainant explained that the article tried to "characterize the facets of the true status of the air emissions program as it is at the Laboratory." (TR 145) It was noted in the article that Complainant found that two technicians compiling air emissions data at TA-21 were not using the same methodology to calculate emissions, and that records for the emissions calculations for a complete year could not be located. (CX 11; EX D) It was also noted that Complainant found a defect in the concrete walls of the plutonium processing facility, and that gases could escape the building without being recorded by the air monitoring system. (CX 11; EX D) Complainant was quoted as follows:

> The Lab is accustomed to doing what it wants without being held accountable. It suppresses information. It fabricates information. And it destroys information (using) using (sic) half truths, lies and slick marketing.

(CX 11; EX D) Complainant made this statement at a press conference held to announce that a settlement had been reached in the Clean Air Act case.(TR 145) Complainant explained that, attending the press conference, were representatives of CCNS, LANL, DOE and perhaps the University of California. (TR 148-149) He specifically stated that Denny Ericson, the Division Director for the Environmental Safety and Health Division

at the Laboratory was present. (TR 148) According to Complainant, Mr. Ericson did not make any remarks to him regarding his participation in the press conference. (TR 150)

In the article, Complainant referred to "shabby" practices. (TR 151) He elaborated on this by explaining that the quality assurance programs "are in a state of disarray", that there is a fair amount of turnover in people, that individuals are dissatisfied, and programs as a whole are ineffective. (TR 152)

Complainant explained that his remarks in the article came from both an interview and the January, 1997 press conference announcing the settlement in the Clean Air Act case. (TR 243-244) He further explained that he specifically mentioned to the reporter that it was

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the QA aspect of the Clean Air Act in which he was considered an expert, although the article simply refers to him as an expert on the Clean Air Act regulations. (TR 247) Complainant stated that he did not release any of his assessments to anyone, including the reporter who wrote the article in the *Santa Fe Reporter*. (TR 254) Complainant does believe he commented to the reporter on the 1995 assessment of the plutonium processing facility. (TR 255-256) Complainant indicated that references in the article to "pervasive evidence of QA non- compliance" and "disdain for QA requirements" probably came from his October 7, 1996 statement, rather than from a discussion with the reporter.[20] (TR 256-257) Complainant did not give the reporter any documented proof, although he made the statements from his own knowledge of information. (TR 258)

After the article came out, Complainant had no discussions about it with Mr. Hecker, Ms. Brittin or Mr. Derkacs. (TR 259-260) Complainant did speak with Mr. Jackson about his concerns in a meeting in June or July of 1997, although they did not speak specifically about the article in the *Santa Fe Reporter*. (TR 260) Complainant stated that he did not receive any oral or written counseling after the article came out, although there were some "snide remarks" in passing from Mr. Derkacs. (TR 261) Complainant noted that the articles from the *Santa Fe New Mexican* and the *Santa Fe Reporter* had been circulated throughout the Laboratory, so he had a "suspicion" that Mr. Loud was aware of their contents. (TR 293)

In an article from the *Albuquerque Journal North* dated January 15, 1997, Complainant was quoted as follows:

> They were doing some monitoring but it was a very cursory kind of monitoring, and there were no processes in place to verify the quality of the data.

(CX 12) He stated that nobody spoke with him about his quote in the article until August of 1997. (TR 153)

Mr. King read the article in the *Santa Fe Reporter*, and he stated that he was "concerned over the fact that there had been a number of evaluations done by the Laboratory about the stack emissions and at no point had we exceeded the limits established by the EPA." (TR 595-596; CX 11; EX D) Mr. King did not speak to Complainant about the articles in the *Santa Fe Reporter* or the *Santa Fe New Mexican*. (TR 612- 613)

Mr. Frostenson read the article in the *Santa Fe Reporter*. (TR 726; EX D; CX 11) He was "surprised" about the article, because Complainant was quoted in the article, and he made a number of statements with which Mr. Frostenson did not agree. (TR 728-729) Specifically, Mr. Frostenson stated that he does not believe that Complainant is an air quality expert, nor has he been used as a subject matter expert in the Clean Air Act. (TR 729) He also stated that he does not believe that LANL suppresses information. (TR 729) Mr. Frostenson believed that the assessors' credibility would be impaired because the

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statements were not factual. (TR 731) He explained that the assessors' relationship with the assessed organization would be jeopardized if the press is given information prior to their having an opportunity to correct any problems. (TR 731)

Ms. Brittin saw the article in the *Sante Fe Reporter*. (TR 882; EX D; CX 11) She was concerned that one of the assessors was being quoted in the article, that there were some inaccuracies and that it would have an effect on the ability of assessors to do their job. (TR 882) She did not speak to Complainant about the article because she was out of the Laboratory a lot of the time on personal matters from September of 1996 through May of 1997. (TR 883) Ms. Brittin stated that Complainant is not considered, in the AA office, to be an expert in the Clean Air Act. (TR 883) She also stated that she has not experienced disdain for QA programs from the director on down the line. (TR 884) It has not been Ms. Brittin's experience that LANL does what it wants without being held accountable. (TR 885) According to Ms. Brittin, Complainant has never come to her with such complaints. (TR 885-886)

Mr. Loud recalled seeing the article in the *Santa Fe Reporter*. (TR 979; EX D; CX 11) He was "surprised" and "saddened to some degree" because he believed it would have a detrimental impact on the group. (TR 980) He explained that by detrimental impact, he meant that it might cause an adversarial relationship between the assessors and customers. (TR 980-981) He also explained that he was surprised because he did not "realize that there was an issue brewing that would result in public disclosure." (TR 980)

F. Objections to Complainant's Participation

At some point after the article in the *Santa Fe Reporter* came out, Mr. Griffin stated that he heard from Dennis Carathers[21] , the Facility Manager at Facility Management Unit 70, and Shirley O'Rourke, the QA advisor associated with the WIPP Projects at

CMR. (TR 538) According to Mr. Griffin, in August or September of 1996, Mr. Carathers remarked that this kind of airing of the Laboratory's laundry in public was unacceptable and he did not want any AA member to participate in reviewing his facilities again.[22] (TR 539) Furthermore, Mr. Carathers stated that, in particular, he did not want Complainant. (TR 539) Mr. Griffin also explained that, in a meeting in December of 1996, Mr. Carathers stated that he did not want Complainant performing an assessment. (TR 539) Although, Mr. Carathers initially stated that the AA group could not be trusted, he later limited this to Complainant. (TR 539) According to Mr. Griffin, Complainant could not be trusted because there were statements in the article that related to the TA-21, the tritium facilities, which may or may not have been true. (TR 540) Mr. Griffin explained that it was Mr. Carathers' belief that "he should be given the opportunity to work out the solutions to the problems without having input from the public." (TR 540)

Mr. Griffin removed Complainant from the assessment of Mr. Carathers' organization. (TR 542) He also advised Mr. Derkacs that he would be unable to use Complainant

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in projects associated with WIPP, or at least projects with which Bobby Villarreal and Shirley O'Rourke were associated, because "they did not trust and did not want to have him gathering information that could possibly be released to the public at a later date."[23] (TR 542)

On February 10, 1997, Mr. Griffin sent an e-mail to Mr. Derkacs. (EX L-6) According to Mr. Griffin, John Ruminer of ESA-DD requested that Complainant not be used on the team for the ESA Hydro build-up assessment because Mr. Carathers of ESA-FM objected to Complainant being on the team. (TR 554; EX L-6) On February 12, 1997, Ms. Brittin received an e-mail from Mr. Derkacs wherein Mr. Derkacs asked Ms. Brittin to talk to the ESH Division in order to get a quality assurance person, other than Complainant, for an assessment. (TR 887; EX L-6) Ms. Brittin stated that not too many such requests are made. (TR 888) Mr. Griffin explained that he had to hire someone inside the Laboratory to take Complainant's place because he was acceding to customer complaints. (TR 567) Mr. Griffin did not think that the replacement was as qualified as Complainant because she did not have the qualifications of working with nuclear materials that Complainant had. (TR 568) Mr. Griffin stated that he never spoke with Complainant about the complaints made by Mr. Carathers or Ms. O'Rourke. (TR 566-567)

Mr. King stated that, after the articles came out, several line organizations expressed concerns over the fact that the information was given to the media, and they did not wish Complainant to be involved in assessments of their organizations. (TR 597) He explained that giving the information to the media "violates the confidentiality that we have tried to establish so strongly." (TR 597) According to Mr. King, Bobby Villarreal and Shirley O'Rourke both "were concerned over the fact that they had very sensitive programs and they did not wish to have what they were doing be the substance of a newspaper article."

(TR 597-598) Mr. King further noted that there was a LANSCE organization that had concerns of a similar nature. (TR 598) He explained that neither organization wanted Complainant to return to their organizations because they were concerned that he was not going to maintain confidentiality. (TR 598-599) Mr. King explained that he was concerned about the complaints he received because it would impact the activities he planned for Complainant, and "it brought a problem of credibility to the rest of the people coming out to do assessments." (TR 599)

Mr. King explained that he acceded to the requests to keep Complainant of the assessment teams, and he brought in other qualified individuals to the team. (TR 600-601)

Mr. Villarreal is a team leader and project manager at LANL, as well as being the project leader on many projects. (TR 640) He is also the project manager for three WIPP programs. (TR 640) Mr. Villarreal read the article in the *Santa Fe New Mexican*, and he was upset with it. (TR 646-647; CX 10; EX E) He explained that "whenever things get into the paper on the information involving WIPP, a little knowledge can be a dangerous thing." (TR 647) He further explained that "we have to spend a great deal of time trying to respond to a lot of questions that people raise because they have very little

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information." (TR 647) Mr. Villarreal noted a particular statement in the article, that WIPP could be producing data that is not fully compliant, as disturbing. (TR 647)

After the article came out, Mr. Villarreal called the AA-2 office to confirm the source of the information. (TR 652) Following that, he instructed Shirley O'Rourke, the quality assurance manager, to request that Complainant not be part of the next requested assessment because he did not want "this kind of information leaking out to the press under an internal audit that we have requested." (TR 653) Mr. Villarreal indicated that he was not trying to improperly manipulate an audit team by making this request. (TR 653) Rather, his primary concern was for his sponsor and customer. (TR 653)

Mr. Villarreal indicated that he judged Complainant without talking to him about why he made the statements attributed to him in the *Santa Fe New Mexican* article. (TR 664) He explained that the statements in the article were dangerous because it would become a problem for his sponsor, the Carlsbad Area Office of the DOE. (TR 665) The article was also a concern because Mr. Villarreal would have to take time to respond. (TR 666)

Mr. Villarreal had an expectation of confidentiality with the assessors, but this was not in writing. (TR 668) He agreed that there were not any details regarding the WIPP project in the article, but he added that "a little knowledge can be taken the wrong way." (668-689) Mr. Villarreal explained that the article, in stating LANL used inadequate quality assurance, made "an encompassing and negative statement about the quality assurance procedures" being used. (TR 671)

Shirley O'Rourke is the Transportation Program Manager at LANL. (TR 675) She recently returned to this position after spending six years in quality assurance working for the Source-Term Test Program (STTP), which is a WIPP program. (TR 675) Ms. O'Rourke read the article in the *Santa Fe New Mexican*. (TR 682; EX E; CX 10) She noted that she was not happy with a paragraph which stated that LANL used inadequate quality assurance procedures related to an experiment for the WIPP program, and that the results of the experiment could not be certified or relied on. (TR 683) Specifically, Ms. O'Rourke stated that to the best of her knowledge, there is no question about the results of the experiment. (TR 683) According to Ms. O'Rourke, there were numerous audits, and at no time did anyone ever question the data, the experimental processes or the methodology. (TR 683) Ms. O'Rourke was not pleased by the article because it was bad publicity and it was not accurate. (TR 684) She also stated that the impact of the article "casts a doubt on the value and on the validity and of the results and of the work that's being done." (TR 684)

Ms. O'Rourke discussed the article with Mr. Villarreal, and then she called Mr. Griffin, who was the team leader for the most recent assessment. (TR 687) She told Mr. Griffin that she did not want Complainant involved in assessments on any projects with which she was affiliated. (TR 687) She explained that she did not feel that Complainant could be trusted because he was passing on confidential information, and because the data he was giving to the newspaper was inaccurate. (TR 687)

Ms. O'Rourke explained that her concerns with regards to the article revolved around the fact that it was "a condemnation of all of the projects of the [WIPP]" and that it was "not specific about what they're talking about." (TR 711) She added that the "way the experiments are put together the results and the data, there's no question about the results or the data." (TR 711)

Ms. O'Rourke indicated that she was satisfied with Complainant's level of competency and his expertise when he did assessments. (TR 692) She stated that she never spoke with Complainant about the statements in the newspaper article, and that she did not know what he based his statements on. (TR 693-694)

According to Mr. Frostenson, Margie Gavett from CST-7 asked that Complainant not be used on an assessment that was being planned. (TR 731-732) Ms. Gavett did not want Complainant because she did not want to read about her problems in the newspaper. (TR 732) Mr. Frostenson indicated that he found another qualified quality assurance person to take Complainant's place. (TR 733) He stated that he informed Mr. Derkacs of Ms. Gavett's complaint. (TR 734) Mr. Frostenson stated that he never spoke with Complainant about Ms. Gavett's request that Complainant not be part of the assessment team. (TR 812) He also stated that he did not try to get access for Complainant. (TR 814)

Ms. Brittin indicated that she is concerned when she gets feedback from assessed organizations relating to the quality of the assessors work. (TR 962) Ms. Brittin agreed that she was concerned enough about the feedback from the assessed organizations to allow work to be taken away from Complainant without his knowledge. (TR 963-964) However, Ms. Brittin later stated that work was not taken away from Complainant, rather, resources were aligned to better serve the interests of the customers. (TR 969-970)

Mr. Loud, when he came on as group leader in March of 1997, scheduled meetings with all the employees. (TR 982) According to Mr. Loud, all three team leaders stated that they had negative customer feedback pertaining to Complainant's participation in certain assessments. (TR 984) He also believed that all three team leaders stated that they had customers who "requested or demanded" that Complainant not be used on their assessments. (TR 984) Mr. Loud recalled being told that Complainant was not working on an assessment because of the customer feedback. (TR 984-986) Mr. Loud stated that he did not do any independent investigation of what the team leaders told him. (TR 985) However, he also stated that some members of the assessed organizations expressed displeasure to him regarding news media disclosure of assessment issues. (TR 1081-1082)

Mr. Loud did not address the situation because he was not sure how to address it at that point. (TR 986) He decided that "the best way to deal with it would be in the upcoming performance appraisals." (TR 986) Mr. Loud stated that he did not consider disciplining Complainant. (TR 986) According to Mr. Loud, some of the group was angry about the disclosure and Complainant's actions. (TR 987) Mr. Loud stated that not using Complainant on assessments "really wasn't an option." (TR 987) He explained that he

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"couldn't let other people dictate who we used on independent assessments", and that he intended to use Complainant as long as he was with the group. (TR 987) Mr. Loud put Complainant back on assessments within a month or two after he became group leader. (TR 988- 989) Mr. Loud believed that Complainant's predominant activity, when he was not doing assessments, was reviewing QA manuals and books.[24] (TR 988)

Complainant stated that he never heard about any complaints from the assessed organizations until the formal hearing, and he was not aware work was being taken away from him. (TR 1154)

G. LANL's Employee Performance Assessment Process

Victoria McCabe is the Office Leader of the Human Resources Policy and Communication Office at LANL. (TR 424) Her duties are to "manage a function which coordinates, writes and disseminates Laboratory policy relating primarily to human resources and other types of employee responsibility matters." (TR 424) Ms. McCabe explained that an Employee Performance Assessment contains a "matrix" section, the

purpose of which is to "describe the job factors or tasks that are expected of the employee and to give space for an indication of performance relative to those factors or tasks." (TR 429; EX C-1) She also explained that there is a "comments" section, the purpose of which is "for the supervisor or manager to expound on the ratings that are contained in the matrix." (TR 430)

If an employee is not satisfied with the performance appraisal, the mechanism set out in AM 109 is for the employee to approach the next level supervisor or manager and discuss the problem with them. (TR 432) A mediation center is also available to provide for a mechanism for employees and supervisors to discuss and resolve any differences. (TR 432) Ms. McCabe stated that an ombudsman office opened in the fall of 1997. (TR 433)

Ms. McCabe explained that the performance appraisal is not considered a disciplinary tool according to AM 112. (TR 433) However, she also explained that there is a correlation between the performance appraisal and salary, and that both the matrix and the comments section can be taken into account. (TR 434) Ms. McCabe described the performance appraisal system as "more performance based management where there are actually goals set out for the employee and some more quantitative measure of whether the employee has achieved those goals or not." (TR 435) She explained that the performance appraisal policy at AM 109 describes "general expectation", but that it is possible, and likely, to find some deviation in the process among groups, divisions and managers at LANL. (TR 435-436)

With regards to AM 729, Ms. McCabe stated that, where an employee believes that the performance appraisal is a form of retaliation, there is no requirement that they exhaust the internal mechanism available to review that performance appraisal. (TR 447; EX C-21) Ms. McCabe agreed that there is no grievance procedure for an adverse performance appraisal, although a salary action could be grieved. (TR 448) She also agreed that a comment in a performance appraisal could be taken into account as one of the factors in determining an individual's pay increase in a particular year. (TR 449)

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Floyd Segura is presently Project Leader in the Compensation and Benefits Group at LANL. (TR 478) Prior to this, he was the Group Leader of Compensation and Benefits at LANL. (TR 479) Mr. Segura explained that LANL is on an October 1 to September 30 fiscal year. (TR 480) Thus, the fiscal year for 1998 begins in October of 1997. (TR 480) He also explained that the salary review exercise for 1998 would begin in September of 1997, and that a salary increase would become effective in the closest beginning of a pay period to the fiscal year. (TR 480-481)

With regards to salary review, Mr. Segura explained that the process managers are asked to use is to look at their employees and place them into peer groups based on job series[25] , job title and similarities in jobs. (TR 484) Managers are asked to look at the performance evaluation that was done for that particular year, look at the employee's

performance, their job content which is equal to their total contribution, look at their salary in alignment relative to the peers within their peer group, and then make salary decisions based on that information. (TR 484-485) Mr. Segura explained that managers have flexibility within the guidance given by the Compensation Group. (TR 485) Specifically, he stated that managers have flexibility to place their people into peer groups as they see appropriate, and to determine raises based on salary alignment, performance and "those kinds of things." (TR 485)

The Director's role in salary determinations is to determine what the allocations are going to be for the four major job series. (TR 488) The manager's role is to allocate merit funds to each of their groups, and they have the flexibility to do that based either on the total payroll in each group or to do it based on other factors like salary alignment and salary needs within the organization. (TR 489) The group leaders submit proposals to their division directors on the individual raises of the employees within their groups. (TR 489)

According to Mr. Segura, for fiscal year 1998, the DOE authorized LANL to increase the technical staff member payroll by four percent. (TR 494) He further explained that because of the performance-based management salary system, the four percent is just what LANL is authorized to increase the total staff member payroll. (TR 494-495) Thus, the percentage increase for each individual could be much lower or much higher depending on their performance, job content and their salary alignment within their peer group. (TR 495)

Mr. Segura explained that managers should form peer groups so that there are similarities and that the similarities can be explained to the people in the peer group. (TR 496) He stated that it would be appropriate to join technical staff members across the division into one peer group, especially if there are a small number of technical staff members in each group. (TR 496) Once a peer group is formed, you look at performance, job content and then salary alignment within that peer group. (TR 497) Mr. Segura stated that factors such as academic degrees and years of experience are less important considerations than the performance

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and job content. (TR 497) He also stated that obtaining a degree does not automatically result in a pay increase, although the obtaining of an advanced degree or special certification are factors that should be taken into consideration when making salary determinations. (TR 497-498, 504)

Mr. Segura stated that an employee's performance assessment, as well as good and bad comments should be taken into consideration. (TR 505) He further stated that if there were any other documents taken into consideration, they should be shown to the employee. (TR 511) Mr. Segura indicated that in the case of an assessor, the work to be considered in the salary determination is the assessing work. (TR 513)

Mr. Segura explained that most salary determinations are made at the team level, then the group leader would review them, followed by review by the division director. (TR 498) He also explained that there is some review at the director level, but that this review would deal with trends and not individual salary increases. (TR 498)

Mr. Segura stated that, in most cases, a team leader's salary would be greater than a non-team leader's salary. (TR 500) Similarly, Mr. Segura stated that employees with leadership roles would more likely receive higher salary increases over employees without leadership roles, because those with leadership roles would have greater job content. (TR 500) He also stated that employees with significantly higher performance ratings than others would have greater salary increases. (TR 501)

It was Mr. Segura's experience that managers have abused their discretion in making salary determinations. (TR 506) He stated that it would be improper to use the salary review process to penalize someone who blew the whistle on unsafe conditions. (TR 507-508)

Mr. Segura did not know whether an employee's salary determination is grievable within LANL's employee complaint process. (TR 517) However, he did state that an employee could go to the Employee Relations Group or the Ombuds Office with salary concerns. (TR 518)

H. Complainant's Performance Assessment

On August 8, 1997, Complainant received his Employee Performance Assessment, prepared by Mr. Loud[26] , for the review period from June 1, 1996, to May 31, 1997. (CX 14) The performance assessment contained an "Evaluation Matrix" which listed seven "Job Factors or Tasks." (CX 14) The seven job factors included; teamwork, customer service, technical/programmatic management, adaptability, tactical goal support, institutional and organizational participation, and professionalism. (CX 14) Complainant received a "Fully Satisfactory Performance" for each job factor except for technical/programmatic management, for which he received an "Exceptional Performance." (CX 14) The performance assessment contains a "Comments" section, which is required for "Exceptional Performance", "Performance Needs Improvement" and "Unsatisfactory Performance." (CX 14) Complainant's performance assessment

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contained the following comments:

> Joe is a well recognized expert in Quality Assurance and continuously strives to maintain and enhance his expertise in this area. He recertified as an ISO 9000 Lead Auditor during this period and is one of only a handful of Laboratory employees to hold this distinction. He has provided leadership to the group in development of standards and operating practices to increase our effectiveness.

> Joe also added to his professional credentials during this period by obtaining a Master of Business Administration/Technology Management degree.
> There was some unfavorable customer feedback during this period regarding the unrestricted distribution of some of Joe's assessment issues. Since Joe routinely works with customers in sensitive and service oriented fashion, I am confident that the trust and confidence of these and other customers can be reestablished through use of new and existing AA/Laboratory channels for issue escalation and resolution. I look forward to working with Joe to use these systems to enhance the Laboratory's ability to identify and correct significant ES&H deficiencies.

(CX 17; EX I) Mr. Loud explained that he included the sentence regarding "unfavorable customer feedback" because it was true, it was something that needed to be on the record, and it was something Complainant needed to know about. (TR 1013) It was also included so "we would have an agreement where we could do a more effective job of what we're chartered to do which is to do internal assessments at the Laboratory." (TR 1087) Mr. Loud explained that the effectiveness of the organization was at stake because of customers' concerns that Complainant had gone to the media. (TR 1069)

Complainant was "rather offended" at the manner in which the customer complaints were introduced, as he had heard no complaints from anyone prior to reviewing the assessment. (TR 155) He asked to be permitted an opportunity to comment, and then he entered his comments in the appraisal. (TR 155, 1016-1017; CX 14; EX I-11) Complainant's comment, in relevant part, stated as follows:

> The comment about the ... "unrestricted distribution of some of Joe's Assessment issue." ... refers to my providing input to the Concerned Citizens for Nuclear Safety (CCNS) law suit brought against the Laboratory.
> The Laboratory channels I attempted to utilize to escalate and alert Lab management of my concerns failed, because line management refused to acknowledge my concerns and denied the existence of the issues and facts I brought to their attention.
> The Court ruled in favor of CCNS and acknowledged my concerns as being valid and corroborated.

(CX 14; EX I-11)

In response to Complainant's comments, Mr. Loud wrote a note, dated August 27, 1997, to Complainant. (TR 1021-1022; EX I-12; CX 15) The note stated as follows:

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> Joe, I was very pleased we could find common ground during your performance appraisal meeting regarding the use of group and Laboratory systems for issue identification and resolution. Based on our discussion, I think we can resolve the customer satisfaction issues we discussed. Regarding the clarification comments you submitted after our meeting, I want to further clarify that my concerns

> regarding customer satisfaction were not related to any involvement you may have had with the CCNS lawsuit. We didn't discuss this lawsuit during our meeting and I did not even recall your CCNS participation at that time.[27] My present concerns and my comments during our meeting were related to media coverage referencing our internal assessment issues. Understandably our customers do not want to read about their real and/or perceived deficiencies in media sources such as the Santa Fe Reporter. We need to be sensitive to these customer concerns and avoid media interaction leading to such coverage of internal assessment issues. Again, I am confident that the course of action we agreed to during your performance appraisal will allow us to avoid this type of customer dissatisfaction in the future.

(CX 15; EX I-12) Mr. Loud explained that he wrote the note because he felt Complainant's comments were inaccurate, and he wanted to correct it for the record. (TR 1022) Mr. Loud's concerns were based on Complainant's comments in the *Santa Fe Reporter*, and he was not concerned with CCNS. (TR 1108-1110) According to Complainant, Mr. Loud indicated that the note would be added to his performance appraisal. (TR 158)

On September 8, 1997, Complainant sent an e-mail to Mr. Loud regarding Mr. Loud's August 27, 1997 note. (TR 159, 1025; CX 18; EX L-1) Complainant had questions about the "customer concerns." (CX 18; EX L-1) He felt that if the note were entered into his appraisal, it would have an adverse action on further employment, and he felt it did not accurately characterize the situation as it had transpired. (TR 159-160) In the e-mail, Complainant reserved the right to go outside the Laboratory when people's lives are at stake. (TR 161; CX 18; EX L-1)

Mr. Loud responded to Complainant's e-mail with an e-mail of his own dated September 25, 1997. (TR 1026; CX 19; EX L-4) Mr. Loud explained that he wanted to make it clear to Complainant that he did not want to interfere with Complainant's legal rights, but he wanted to reemphasize that he was still concerned about the issue. (TR 1028) He also explained that he made the comment about not going to the media, because he "didn't believe that was within [Complainant's] legal rights."[28] (TR 1028-1029) Mr. Loud indicated that he was referring specifically to releasing information that would have been learned from work within the group. (TR 1029)

On October 3, 1997, Complainant prepared a memo documenting a conversation he had with Mr. Loud regarding his raise. (TR 173, 1030; CX 20) Complainant objected to the negative comments in his performance assessment relating to customer dissatisfaction. (TR 173-174) According to Complainant, Mr. Loud stated that he did not have much participation in the performance assessment, but that it was probably Mr. Derkacs or Ms. Brittin who did. (TR 174) According to Complainant, Mr. Loud indicated that he felt Complainant contributed more to the Laboratory than was reflected in the raise. (TR 175)

Mr. Loud presented Complainant with a notification of his raise, which was dated September 30, 1997. (TR 176; CX 21) Complainant's raise was 2.75 percent. (TR 175; EX J)

According to Mr. Loud, it was "conceivable" that he told Complainant that he wished the raises were more, because he did not feel that there was a very big pool to begin with. (TR 1060) He explained that he does not remember telling Complainant that he had nothing to do with Complainant's salary determination, although he added that he might have been referring to the size of the pool. (TR 1060) Mr. Loud also did not recall telling Complainant that he would try to make it up the next year. (TR 1061) He did recall that Complainant stated that he could do more. (TR 1062) Mr. Loud assumed Complainant was referring to the fact that he was not being used on some assessments, and he agreed with Complainant's statement. (TR 1062) Mr. Loud indicated that he was not commenting that Complainant's contribution was actually greater than that which was reflected in his pay increase. (TR 1062-1063)

Ms. Brittin indicated that she became aware of the comment regarding "unfavorable customer feedback" sometime in the summer of 1997, when Mr. Loud brought it to her attention. (TR 890) According to Ms. Brittin, Mr. Loud wanted to communicate to Complainant that there were issues concerning the way he distributed some of the assessment issues. (TR 891) She did not believe that the comment referring to "unfavorable customer feedback" was made in retaliation for Complainant's statement to CCNS. (TR 909) She explained that she did not discuss the "unfavorable customer feedback" with Complainant because she was away from the laboratory for most of the time between September of 1996 and May of 1997. (TR 891) She also explained that the performance assessment was the proper way to address the issue since it was the place to provide feedback to employees. (TR 891-892)

Mr. Loud did not recommend Mr. Gustafson's raise for fiscal year 1997[29] , although he did make salary recommendations for the employees in the AA-2 group.[30] (TR 1045-1046; EX J) Mr. Loud recommended Complainant's salary increase for fiscal year 1998. (TR 1046; EX J) He explained that the salary determinations were made by using the performance appraisals and the ratings within those appraisals to group people with similar ratings with the idea that higher ratings should be entitled to higher compensation. (TR 1047) Then, at a meeting of all of AA's management, the group leaders "do a little trading", as there is a finite amount of money from which to distribute. (TR 1047-1048)

Mr. Loud made his salary recommendation based on performance and job content, and he explained that the performance assessment weighed heavily in making the salary determination. (TR 1099-1101) According to Mr. Loud, job content was the "only objective differentiation" between Complainant, Mr. Beckmann and Mr. Emerson. (TR 1103) Mr. Loud agreed that one of the reasons he gave more money to Mr. Beckmann was because he was the team leader of the management self-assessment. (TR 1103) Mr.

Loud noted that Complainant's job content had been affected that year, as Complainant had been taken off assessments because of customer complaints. (TR 1106-1107) However, he explained that he never took into consideration that Complainant was not fully engaged during the assessment period, and that he considered all the team members to have similar job content. (TR 1113)

Mr. Loud stated that the performance appraisal system can be a disciplinary tool, but that he was not using it as a disciplinary tool in this case. (TR 1014) He admitted that his second paragraph in the comments section was not required and that it could give the impression that Complainant's performance needed improvement, although that was not his intent. (TR 1077) According to Mr. Loud, comments in a performance appraisal might be taken into account in making salary decisions, and that they might be evaluated in terms of promotion. (TR 1083-1084)

After discussing the salary determinations with the group leaders, the recommendations are sent to Ms. Brittin for approval. (TR 1058) Mr. Loud indicated that Ms. Brittin approved the recommendations that came from the management team. (TR 1058) Mr. Loud believed that Complainant's rating in the raises was an accurate reflection of his contribution to the group, although he would have liked a bigger pot of money to divide at the outset. (TR 1058) According to Ms. Brittin, she did not recall Complainant's raise recommendation being changed at the team management meeting. (TR 904-905) She indicated that Complainant's raise was appropriate and based on his contribution to the organization. (TR 905)

Complainant did not see a completed copy of the performance appraisal, including Mr. Loud's August 27, 1997 note, until early 1998. (TR 169) He "got rather mad" because he had sent the e-mail to Mr. Loud regarding his reservations about the note being entered into the appraisal, and because he had requested additional information.[31] (TR 169) Complainant pointed out that the Administrative Manual requires that, before a performance assessment addendum is placed in the employee's official personnel file, the employee and the supervisor must read, discuss, and sign the assessment replacement or addendum.[32] (TR 169-170) Complainant stated that he never signed Mr. Loud's note. (TR 170)

Complainant provided four reasons why he was upset about Mr. Loud's note. First, it would have an adverse impact on his employment, both at the Laboratory and as a reflection on prior employment.[33] (TR 170-171) Second, the administrative procedure which details how such comments were to be entered was not observed. (TR 171) Third, the comment has a chilling effect on his ability to raise concerns without intimidation and the threat of retaliation. (TR 170) Fourth, the comment does not relate to his performance, but to the dissatisfaction of others based on his whistleblowing activities. (TR 170, 298)

Complainant did not seek a higher level of management review of his performance appraisal, as is allowed by AM 109.23. (TR 313-314, 892; EX C-4)

Complainant indicated that he has been asked to assist a different group for a period of six months, with the possibility of an extension. (TR 312) He also indicated that the group has the choice of whether to accept his participation. (TR 313) Complainant assumed that the group would have the opportunity to see his performance appraisals if they wanted. (TR 313)

II. Preliminary Matter

Respondent has argued that Complainant's speech is not protected by the First Amendment to the United States Constitution because it fails the balancing test enumerated by the United States Supreme Court in **Pickering v. Board of Education**, 391 U.S. 563, 88 S.Ct. 1731 (1968) and **Connick v. Myers**, 461 U.S. 138, 103 S.Ct. 1684 (1983). (EX X at 20-25) According to Respondent, although Complainant's speech was of public concern, his chosen method of delivering the speech was unduly disruptive to Respondent's business activities, and thus, Complainant's speech falls outside the gambit of First Amendment protection. (EX X at 25)

This Administrative Law Judge finds Respondent's arguments unpersuasive. None of the cases cited by Respondent in its post-hearing brief, with regards to the First Amendment issue, concerned matters arising out of the employee protection provisions of the ERA. Those provisions are set forth at 42 U.S.C. §5851, and I will conduct my analysis pursuant to them, and pursuant to the implementing regulations set forth at 29. C.F.R. Part 24.

III. Discussion

This case proceeded to a full hearing on the merits. Accordingly, examining whether Complainant has established a **prima facie** case is no longer particularly useful and this Administrative Law Judge shall consider whether, viewing all of the evidence as a whole, the Complainant has shown, by a preponderance of the evidence, that he was discriminated against for engaging in protected activity. **See Boudrie v. Commonwealth Edison Co.**, 95-ERA-15(ARB 04/22/97); **Boytin v. Pennsylvania Power and Light Co.**, 94-ERA-32 (Sec'y 10/20/95); **Marien v. Northeast Nuclear Energy Co.**, 93-ERA-49/50 (Sec'y 09/18/95). To carry that burden, Complainant must prove that Respondent's stated reasons for placing the comment regarding "negative customer feedback" in his performance assessment, and for giving him a 2.75% pay increase for fiscal year 1998, are pretextual, **i.e.**, that they are not the true reasons for the adverse actions and that the protected activity was. **Leveille v. New York Air Nat'l Guard**, 94-TSC-3/4, at p. 4 (Sec'y 12/01/95); **Hoffman v. Bossert**, 94-CAA-4, at p. 4 (Sec'y 09/19/95). It is not sufficient that Complainant establish that the proffered reasons were unbelievable; he must establish intentional discrimination in order to prevail. **Leveille**, **supra**.

A complainant under the ERA must prove that retaliatory action was taken against him because he engaged in conduct listed in 42 U.S.C. §5851(a)(1), (2) or (3), which the Secretary has interpreted broadly to mean any action or activity related to nuclear safety. **Keene v. Ebasco Constructors, Inc.**, 95-ERA-4 (ARB 02/19/97)(complainant engaged in protected activity where he reported safety concerns that were neither frivolous nor extraneous to the safety interests promoted by the whistleblower protections of the ERA); **Van Beck v. Daniel Constr. Co.**, 86-ERA-26 (Sec'y 08/03/93)(complainant engaged in protected activity where he expressed concerns about non-nuclear hazards present during the construction phase of a nuclear power plant which had a potentially substantial effect on nuclear safety). **Cf. Roberts v. Rivas Environmental Consultants, Inc.**, 96-CER-1 (ARB 09/17/97)(dismissing complaint because employee raised concerns about occupational safety and health matters, rather than CERCLA protected activities); **Tucker v. Morrison & Knudson**, 94-CER-1 (ARB 02/28/97)(holding that certain safety concerns raised by complainant were not protected by the CERCLA because they did not relate to *environmental* safety, but rather to *occupational* safety)(emphasis in original).

On the basis of the totality of this closed record, I find and conclude that Complainant has established by a preponderance of the evidence that he engaged in protected activity and that Respondent was aware of it. Complainant raised concerns regarding the need for as-built configuration design (TR 81-82, 1143-1144; CX 4), implementation of the quality assurance program (TR 75-76, 122-124; CX 2; CX 27), the potential for leaks between the concrete placements at the plutonium facility (TR 128-129), and problems with the radionuclide monitoring system (TR 127-132, 1148-1149; EX G). This Administrative Law Judge finds Complainant's concerns to be within the parameters of the ERA as they relate to nuclear safety. **See Smith v. Esicorp, Inc.**, 93-ERA-16 (Sec'y 03/13/96).

Complainant raised his concerns in the BUS and TSFF assessments, and in his March 22, 1996 memo. (EX G, H; CX 2) Such internal safety and quality control complaints are within the scope of protected activities covered by the ERA. **Kansas Gas & Elec. Co. v. Brock**, 780 F.2d 1505 (10th Cir. 1985), **cert. denied**, 478 U.S. 1011, 92 L.Ed. 2d 724, 106 S.Ct. 3311 (1986). Complainant is employed at LANL as an internal assessor in the Office of Audits and Assessments (ALJ EX 18), and he is a subject matter expert in the area of quality assurance. (EX W at 22) Employees performing quality control and quality assurance functions are engaged in activity protected by Section 5851 of the ERA. **Richter v. Baldwin Associates**, 84-ERA-9 to 10 (Sec'y 03/12/86)(order of remand)(**citing Mackowiak v. University Nuclear Systems, Inc.**, 735 F.2d 1159(9th Cir. 1984)("In a real sense, every action by quality control inspectors occurs 'in an NRC proceeding,' because of their duty to enforce NRC regulations.")); **Collins v. Florida Power Corp.**, 91-ERA-47 and 49 (Sec'y 05/15/95)(employees engaged in quality control work in nuclear power facilities are precisely the people the ERA whistleblower provision is designed to protect).

In early 1996, Complainant raised his concerns regarding quality assurance and the potential for leaks in the plutonium facility with Mr. Le Doux of the Department of Energy. (TR 83, 464-466) Complainant provided his October 7, 1996 statement to Congressman Richardson and Senator Bingaman, among others. (TR 139; CX 27) These contacts with a federal agency and the New Mexico congressional delegation are protected under the employee protection provision of the ERA. **See Saporito v. Florida Power & Light Co.**, 89- ERA-7 and 17 (Sec'y 06/03/94)(employee who bypassed the chain of command to speak directly with the Nuclear Regulatory Commission engaged in protected activity).

Complainant also provided CCNS with his October 7, 1996 statement. (TR 139) CCNS submitted Complainant's statement, as an attachment to another document, to Judge DeGiacomo in connection with the Clean Air Act lawsuit. (TR 404-405) It was Complainant's expectation that by giving his statement to CCNS, he could get his concerns to the court. (TR 375-376) I find that Complainant's contact with CCNS is protected activity. **See Scott v. Alyeska Pipeline Service Co.**, 92-TSC-2 (Sec'y 07/25/95)(providing information to a private person for transmission to responsible government agencies, or for use in environmental lawsuits against one's employer is protected activity under the CAA, SWDA, TSCA, and FWPCA), **citing Simon v. Simmons Indus.**, 87-TSC-2 (Sec'y 04/04/94). **See also Nunn v. Duke Power Co.**, 84-ERA-7 (Sec'y 07/30/87)(complainant may be able to establish that contact with public interest group was protected activity pursuant to 42 U.S.C. §5851 (a)(2) and (a)(3)).

Finally, Complainant was quoted in articles published in the *Santa Fe New Mexican* and the *Santa Fe Reporter*. (CX 10, 11; EX E, D) His comments related to the quality assurance program, and to his findings from his assessments of the tritium and plutonium facilities. (CX 10, 11; EX E, D) Communications with the media are protected activities under the Act. **Wedderspoon v. City of Cedar Rapids, Iowa**, 80-WPC-1 (Sec'y 07/28/80); **Carter v. Electrical District No. 2 of Pinal County**, 92-TSC-11 (Sec'y 07/26/95)(contact with the press is protected activity under the whistleblower statutes); **Floyd v. Arizona Public Service Co.**, 90-ERA-39 (Sec'y 09/23/94)(complainant engaged in protected activity when he met with a newspaper reporter and provided him documents concerning safety at the respondent's nuclear facility).

Complainant has also established by a preponderance of the evidence that Respondent was aware of his protected activity. To establish the element of knowledge of complainant's protected activities, the evidence must show that respondent's managers responsible for taking the adverse actions had knowledge of the protected activities. **Floyd v. Arizona Public Service Co.**, 90-ERA-39 (Sec'y 09/23/94).

Mr. Loud, who prepared Complainant's performance assessment, was aware of much of Complainant's protected activity. According to Ms. Brittin, she briefly discussed Complainant's October 8, 1996 statement with Mr. Loud. (TR 871-872) Mr. Loud admitted that he saw the article in the *Santa Fe Reporter*, and he added that he was

"surprised" and "saddened to some degree" because he believed it would have a detrimental impact on the group. (TR 979-980) Mr. Loud also admitted that some

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members of the assessed organizations expressed displeasure to him regarding news media disclosure of the assessment issues. (TR 1081-1082) Furthermore, all three team leaders informed Mr. Loud that they had negative customer feedback concerning Complainant's participation in certain assessments. (TR 984) Mr. Loud was also aware of Complainant's participation in the CCNS lawsuit, although he stated that he did not recall such participation at the time of the performance appraisal meeting. (CX 15; EX I-12)

Ms. Brittin, who reviewed and approved Complainant's performance assessment, was also aware of Complainant's activity. Ms. Brittin did receive a copy of Complainant's March 22, 1996 memo to Mr. Derkacs, and she conceded that the memo did reference health and safety issues. (TR 837, 917-919) She also received a copy of Complainant's October 7, 1996 statement, after it was faxed to her by the Public Affairs Office. (TR 870) Ms. Brittin read the articles in both the *Santa Fe New Mexican* and the *Santa Fe Reporter*, and she was aware of Complainant's participation with CCNS. (TR 872, 882, 961)

The uncontroverted evidence also establishes that Mr. Jackson, the Deputy Director of the Laboratory, was aware of Complainant's protected activity. Complainant sent a copy of his March 22, 1996 memo to Mr. Jackson. (TR 79; CX 2) According to Mr. Le Doux, he informed Mr. Jackson that Complainant was concerned about getting a report through audits and assessments, and that Complainant was concerned about concrete placements. (TR 469-470) Mr. Le Doux also stated that Mr. Jackson informed him that LANL had followed up on Complainant's concerns. (TR 470) In June or July of 1997, Complainant spoke with Mr. Jackson about some of his concerns. (TR 260)

Mr. Derkacs, who prepared an interim performance assessment for Complainant[34] , was also aware of Complainant's protected activity. Complainant's March 22, 1996 memo was addressed to Mr. Derkacs, and the memo set forth Complainant's concerns over the quality assurance program. (TR 75-76; CX 2) Furthermore, after publication of the article in the *Santa Fe Reporter*, Mr. Derkacs made some "snide remarks" in passing to Complainant. (TR 261) According to Mr. Griffin, he informed Mr. Derkacs that he could not use Complainant on projects associated with Mr. Villarreal and Ms. O'Rourke because they did not want Complainant gathering information that could possibly be released to the public. (TR 542)

Other Employees at LANL were also aware of Complainant's protected activity. Both Mr. Griffin and Mr. King read the article in the *Santa Fe New Mexican*. (TR 534, 592) Mr. King and Mr. Frostenson both read the article in the *Santa Fe Reporter*. (TR 595, 726) According to Mr. Griffin, Mr. Carathers was aware of Complainant's contacts with the media, as Mr. Carathers remarked that the airing of the Laboratory's dirty laundry in

public was unacceptable. (TR 538-539) Mr. Villarreal and Ms. O'Rourke both read the article in the *Santa Fe New Mexican*, after which they requested Complainant not be assigned to assessments of their facilities. (TR 646-653, 682-687) According to Mr. Frostenson, Ms. Gavett requested that Complainant not be used on an assessment that was being planned because she did want to read about her problems in the newspaper. (TR 732)

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Respondent argued that the comment in Complainant's performance assessment regarding "unfavorable customer feedback", and the 2.75% pay raise for fiscal year 1998 were not adverse employment actions. Respondent further argued that the comment in the performance assessment was not an adverse action because it did not meet the ERA definition of an adverse action, the comment was a proper statement of fact regarding "true" customer feedback, and Complainant suffered no adverse consequences as a result of the notation in his performance appraisal. This Judge rejects each of these arguments and addresses each in turn.

Respondent argued that the comment regarding "unfavorable customer feedback" does not meet the definition of adverse action because the "entries reflect positively on the Complainant and record the Supervisor's willingness to work with, and confidence in the, Complainant." (EX X at 30) However, the narrative contained in a performance appraisal may constitute adverse action, even if the ultimate rating does not. **Varnadore v. Oak Ridge National Laboratory**, 92-CAA-2 and 5, 93-CAA- 1 and 94-CAA-2 and 3, slip op. at 32 (ARB 06/14/96), **citing Bassett v. Niagra Mohawk Power Corp.**, 85-ERA-34, slip op. at 4 (Sec'y 09/28/93). Thus, the fact that Mr. Loud's comment contains other statements that could be perceived as positive does not negate the overall tone of the comment. Furthermore, this Administrative Law Judge does not find that Mr. Loud's comments, that he is "...confident that the trust and confidence of these and other customers can be reestablished...", and that he "...looks forward to working with..." Complainant, reflect positively on Complainant. Such comments show that customers no longer trust or have confidence in Complainant, because of his engaging in protected activity.

Citing to **Varnadore v. Oak Ridge National laboratory**, 92- CAA-2 and 5, 93-CAA-1 and 94-CAA-2 and 3 (ARB 06/14/96), Respondent argues that the comment regarding "negative customer feedback" is a mere statement of fact that does not constitute an adverse action. (EX X at 30) In **Varnadore**, the respondent introduced the complainant at a meeting by stating, "we all know him." **Id**. With regards to this statement, the ARB reasoned as follows:

> Given the amount of publicity that the Varnadore cases have generated, Minter's comment was merely a statement of fact. Certainly nothing which even arguably had an adverse impact on Varnadore's work environment can be read into this innocuous remark.

Id. The situation in the present matter is distinguishable from the one in **Varnadore**. Here, Mr. Loud included the comment in Complainant's performance assessment, as opposed to making the comment to a gathering of people. Comments in a performance assessment can be taken into account as one of the factors in determining an individual's pay increase in a particular year. (TR 449) In fact, Mr. Loud stated that the performance assessment weighed heavily in making the salary determination. (TR 1099-1101) Mr. Loud also stated that comments in the performance assessment are part of Complainant's

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permanent record, and could be evaluated in terms of promotion. (TR 1083-1084) Thus, as the comment regarding "unfavorable customer feedback" was included in Complainant's performance assessment, and as Mr. Loud admitted that the performance assessment weighed heavily in making the salary determination, it would be incongruous to find that the comment did not have an adverse impact on Complainant's work environment.

Furthermore, the comment regarding "unfavorable customer feedback" cannot be considered an "innocuous remark", as was the comment in **Varnadore**. While the comment in **Varnadore** was obviously an acknowledgment of the complainant's alleged whistleblowing activities, the comment itself was harmless. In the present matter, the comment regarding "unfavorable customer feedback" is, on its face, a negative reflection on Complainant's job performance.

Respondent's final argument was that Complainant has suffered no adverse consequences as a result of the comment in the performance assessment, specifically noting that Complainant has been asked to assist another group within the Laboratory. (EX X at 31) As previously discussed, the comment regarding "unfavorable customer feedback" was included in Complainant's performance assessment, and Mr. Loud admitted that the performance assessment weighed heavily in making the salary determination. Thus, the comment did cause Complainant to suffer an adverse consequence. Furthermore, negative comments made in a performance evaluation can, in themselves, constitute an adverse action. **Bassett v. Niagara Mohawk Power Corp.**, 85-ERA-34 (Sec'y 09/28/93)(negative comments and warnings contained in performance evaluation are an adverse work evaluation, affected the terms of complainant's employment, and they constitute an adverse employment action).

Also, the fact that a group within the Laboratory later requested Complainant's participation does not lead to the conclusion that the comment has not interfered with opportunities available to Complainant. Mr. Carathers, Mr. Villarreal, Ms. O'Rourke, Mr. Ruminer and Ms. Gavett all informed the team leaders that they did not want Complainant participating in assessments of their facilities because of his contacts with the media. (TR 538-539, 554, 646-653, 683-684, 731-732) Mr. Griffin, Mr. King and Mr. Frostenson each indicated that they acceded to requests to keep Complainant off the assessment teams. (TR 542, 600-601, 733-734)

Ms. Brittin agreed that she was concerned enough about the feedback from the assessed organizations to allow work to be taken away from Complainant without his knowledge. However, she later characterized the actions as "aligning our resources...to better serve the interests of our customers..." (TR 969) Euphemisms aside, the result is clearly the same: work was taken away from the Complainant. Although these incidents, which formed the basis of the unfavorable customer feedback, occurred *prior* to the comment being included in Complainant's performance assessment, to argue that Complainant's work environment was not affected *after* inclusion of the comment strains credulity.

Respondent generally asserts that Complainant's 2.75% pay raise for fiscal year 1998 does not constitute an adverse action, although Respondent did not set forth any specific rationale in its post-hearing brief to support this conclusion.

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This Administrative Law Judge finds that Complainant's 2.75% pay raise for fiscal year 1998 does constitute an adverse action. Whistleblower provisions prohibit discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment, including transfers to a less desirable position, even if no loss of salary is involved. **Carter v. Electrical District No. 2 of Pinal County**, 92-TSC-11 (Sec'y 07/26/95), **citing DeFord v. Sec. of Labor**, 700 F.2d 281, 283, 287 (6th Cir. 1983); **Jenkins v. U.S. EPA**, 92-CAA-6, (Sec'y 05/18/94). Although Complainant did receive a pay increase for fiscal year 1998, for the reasons stated below, I find that such increase does constitute an adverse action.

As previously noted, salary determinations at the Laboratory are based on performance and job content. (TR 490) An employee's performance assessment, as well as good and bad comments, should be taken into consideration. (TR 505) Mr. Loud admitted that his salary recommendation was based on performance and job content, and that the performance assessment weighed heavily in making the salary determination. (TR 1099-1101) In fact, Mr. Loud stated that the performance assessment was the only document used in determining Complainant's pay raise. (TR 1100-1101) Given Mr. Loud's admitted reliance on the performance assessment in making the salary determination, and given that the performance assessment contained the comment regarding "unfavorable customer feedback", it is evident that such comment was a factor in the pay raise given to Complainant. It is equally evident that such comment had a detrimental impact on Complainant's pay raise, as "unfavorable customer feedback" is, on its face, a negative comment.

Furthermore, Mr. Loud stated that job content was the "only objective differentiation" between Complainant, Mr. Beckman and Mr. Emerson. (TR 1103) Mr. Loud noted that Complainant's job content had been affected because Complainant was taken off assessments because of customer complaints. (TR 1106-1107) As previously discussed, these customer complaints arose out of Complainant's contacts with the media regarding health and safety issues at LANL. (TR 538-539, 554, 646-653, 683-684, 731-732) Thus,

work was taken away from Complainant because of his protected activity, and this reduction in work was used to justify Complainant's pay raise.

I note that Mr. Loud explained that he did not take into consideration that Complainant was not fully engaged during the assessment period, and that he considered all the team members to have similar job content. (TR 1113) However, had work not been taken away from Complainant, he would have had a greater job content than that which was considered by Mr. Loud. Under either scenario, Complainant's job content was reduced because of his protected activity, and this reduction had a negative impact on Complainant's pay raise.

Respondent has also argued that the comment in Complainant's performance assessment and the 2.75% pay raise are not causally related to protected activity because they were made for legitimate business reasons and served a valid business purpose. (EX X at pp. 32-44) Specifically, Respondent argues that it was trying to accomplish the objectives

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outlined in the Administrative Manual. (EX X at 33) The objectives of the performance assessment, as set out in AM 109.05, are as follows:

> The performance assessment process should provide employees and supervisors with a mutual understanding of job responsibilities and provide a basis for a meaningful assessment of performance. This process should also improve job performance, job satisfaction, and productivity of the employees; develop and maintain open communication between employees and their supervisors; Provide input into the salary review process; and encourage a discussion of employee development.

(CX 25-10; EX C)

This Administrative Law Judge recognizes the whistleblower statutes do not restrict an employer in its operational decisions. **Bauch v. Landers**, 79-SDW-1 (Sec'y 05/10/79)(quoting the ALJ's R.D.O.). **See Also Ray v. Harrington**, 79-SDW-2 (Sec'y 07/13/79). The statutes do not, and should not, preclude management from taking steps to assure and maintain the effectiveness of its staff in enforcing a particular environmental statute and the employer should not be faulted for mandating an adverse action, such as reassignment or termination or removal, to achieve this action. However, in **Timmons v. Franklin Electric Coop.**, 1997-SWD-2 (ARB 10/01/98), the ARB held that it did not run afoul of the prohibition against DOL supplanting the employer's business judgment when they found that complainant's termination was prompted by his protected activity, and not by respondent's explanation of poor work performance.

Respondent, despite arguments to the contrary, has virtually admitted that the comment regarding "unfavorable customer feedback" was related to Complainant's protected activity. The "unfavorable customer feedback" in question came from LANL employees, such as Mr. Carathers, Ms. O'Rourke, Mr. Villarreal, Mr. Ruminer and Ms. Gavett, and it was in reference to Complainant going to the media with his safety and health concerns. (TR 538-539, 687, 652-653, 554, 732) Mr. Loud, in his August 27, 1997 note to Complainant, stated as follows:

> ...My present concerns and my comments during our meeting were related to media coverage referencing our internal assessment issues. Understandably our customers do not want to read about their real and/or perceived deficiencies in media sources such as the Santa Fe Reporter. We need to be sensitive to these customer concerns and avoid media interaction leading to such coverage of internal assessment issues. ...

(CX 15; EX I-12) Mr. Loud explained that his concerns were based on complainant's comments in the *Santa Fe Reporter*, although he was not concerned with CCNS. (TR 1108-1110) Thus, Respondent's argument, that the comment in Complainant's performance assessment was not in retaliation for Complainant's protected activity, is disingenuous at best, as the comment is admittedly made in reference to Complainant's contacts with the media over health and safety issues.

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Respondent's argument that the comment was made for legitimate business reasons and served a valid business purpose does not place its actions outside the purview of the Act. As the ARB explained in **Timmons v. Franklin Electric Coop.**, 1997-SWD-2 (ARB 12/01/98):

> ... It is well-settled that the employee protection provided by the SWDA and similar statutes does not prohibit an employer from imposing a wide range of requirements on employees. **See, e.g., Kahn v. U.S. Sec'y of Labor**, 64 F.3d 271, 279 (7th Cir. 1995)(under the Energy Reorganization Act); **see also Smith v. Monsanto Chem. Co.**, 770 F.2d 719, 723 n.3(8th Cir. 1985)(noting, in a case arising under Title VII of the Civil Rights Act of 1964, that employer may develop arbitrary, ridiculous and even irrational policies as long as they are applied in a nondiscriminatory manner), **cert. denied**, 475 U.S. 1050 (1986). When an employer applies an otherwise legitimate criterion in such a way that it interferes with the exercise of specific whistleblower rights, however, the employer acts in violation of the employee protection provision of the corresponding statute. **See Assistant Sec'y and Ciotti v. Sysco Foods of Philadelphia**, ARB No. 98-103, ALJ Case No. 97- STA-00030, July 8, 1998, slip op. at 8 (**citing Self v. Carolina Freight Carriers Corp**., Case No. 91-STA-25, Sec. Dec., Aug. 6, 1992, slip op. at 5).

> An employer's expectation that an employee interact with others in the company as a "team player" does not constitute a proscribed criterion **per se**. **See Odom v. Anchor Lithkemko/International Paper**, ARB No. 96-189, ALJ Case No. 96-WPC-0001, Oct. 10, 1997, slip op. at 12; **Erb v. Schofield Mgmt.**, ARB No. 96-056, ALJ Case No. 95-CAA-1, Sept. 12, 1996, slip op. at 2-3. Nonetheless, the extension of that expectation to a point where it interferes with protected activity is prohibited.

In the present matter, the objectives of the performance assessment, as set forth in AM 109.05, do interfere with Complainant's protected activity. The "unfavorable customer feedback" relates solely to Complainant's media contacts concerning health and safety concerns, and comments in performance assessments are taken into account when making salary determinations. (TR 505) The tone and the content of the comment clearly manifest an intent to inform the Complainant that his engaging in protected activity was not met with approval. The provisions of Respondent's Administrative Manual do not take precedence over the employee protection provisions of the Act.

Furthermore, the situation in the present case is similar to those in which an employer expects an employee to interact with others at the company as a "team player." Although Mr. Loud did not specifically use the phrase "team player" in Complainant's performance assessment, his comment plainly implies that Complainant is not

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a "team player", and that Complainant must stop engaging in protected activity if he wants to be considered a "team player." Mr Loud's comment stated as follows:

> There was some unfavorable customer feedback during this period regarding the unrestricted distribution of some of Joe's assessment issues. **Since Joe routinely works with customers in sensitive and service oriented fashion, I am confident that the trust and confidence of these and other customers can be reestablished through use of new and existing AA/Laboratory channels for issue escalation and resolutions.** I look forward to working with Joe to use these systems to enhance the Laboratory's ability to identify and correct significant ES&H deficiencies.

(Emphasis added)(CX 17; EX I)

Mr. Loud emphasized his point more clearly in his September 25, 1997 e- mail to Complainant, wherein he stated, in relevant part, as follows:

> ... In no case, however, should assessment issues be passed along to the media or to any organization outside of appropriate and established avenues for such disclosure. Uncontrolled disclosure of our assessment issues can lead to alienation of our customers and make it more difficult for the group to obtain the

cooperation necessary to provide the Laboratory with an accurate and vitally important assessment of its ES&H status.

(CX 19) Mr. Loud explained that he made the comment about not going to the media, because he "didn't believe that was within [Complainant's] legal rights." (TR 1028- 1029) Although he later explained that he misspoke if he stated that Complainant had no legal right to go to the media, he added that, as a supervisor, he feels he has the right to ensure that his organization is run as effectively as possible. (TR 1086) Mr. Loud's comments establish that Complainant lost the trust of other LANL employees because of his engaging in protected activity, and that if he wanted to regain that trust, he would have to cease engaging in such protected activity. Thus, Respondent's expectation that Complainant be a "team player" has interfered with his protected activity, and therefore, is prohibited. **See Timmons v. Franklin Electric Coop.**, 1997-SWD-2 (ARB 12/01/98)

While some members of the AA2 group saw themselves as mere "servants" (TR 593-594), Complainant commendably persisted in his attempts to force Respondent to address the safety and health issues he identified. Clearly, Complainant, unlike some Laboratory employees, does not think that "a little knowledge can be a dangerous thing." (TR 647)

This Administrative Law Judge also finds that Respondents asserted reasons for including the comment in Complainant's performance assessment are not credible because actions taken by Complainant's superiors are not consistent with those asserted reasons. Respondent argues that AM 109.05 serves the legitimate business purposes of: 1) increasing

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dialogue between employees and their supervisors; 2) clarifying employees' job duties, and 3) identifying problems. (EX X at 33) It is doubtful that Respondent was truly interested in increasing dialogue, clarifying job duties or identifying problems, as no one at LANL spoke to Complainant about his actions until August 8, 1997. **See Nichols v. Bechtel Construction, Inc.**, 87-ERA-44 (Sec'y 10/26/92)(respondent's stated reason for laying off complainant, poor job performance and attitude, were not credible where the three instances of poor performance were not discussed with complainant or foreman's superiors).

Ms. Brittin never discussed with Complainant his October 7, 1996 statement, or the articles in the *Santa Fe New Mexican* and the *Santa Fe Reporter*, even though she was concerned over their contents.[35] (TR 871-874, 883) Mr. Loud was "surprised" and "saddened to some degree" when he saw the article in the *Santa Fe Reporter*. (TR 979-980) Although Mr. Loud assumed the role of group leader for AA2 in March of 1997, he did not inform Complainant of the "unfavorable customer feedback" until August of 1997. (TR 974, CX 14) In fact, when Mr. Loud took over as group leader, he scheduled meetings with all the employees (TR 982), and yet he never informed Complainant of the "unfavorable customer feedback." Mr. Loud explained that he was not sure how to

address Complainant's situation when he took over as group leader, and that he felt that the best way to deal with it would be in the performance assessment. (TR 986)[36] Given the widespread concern by LANL employees over Complainant's contacts with the media, the fact that no one spoke with Complainant about his actions until August of 1997, and as Complainant was being kept off of assessments at the request of customers, this Administrative Law Judge finds it is untenable that the comment regarding "unfavorable customer feedback" was included in Complainant's performance assessment out of a desire to comply with the objectives of AM 109.05.

A great deal of testimony in this matter has been dedicated to the confidentiality of assessments performed by the AA2 group. Mr. Griffin, Mr. King and Mr. Frostenson each stated that there is an expectation that assessments are to remain an internal document to the Laboratory (TR 544, 587, 723-724), although neither Mr. King nor Mr. Griffin are aware of any written policy setting forth that assessments are for internal use only. (TR 608- 609, 570) Ms. Brittin also stated that it was her expectation that assessment reports are for internal distribution only.[37] (TR 828- 836) Even assuming that it was LANL's policy that assessments are for internal use only, this Administrative Law Judge finds that such a policy interferes with Complainant's right to go to the media with his health and safety concerns, and thus, is in violation of the employee protection provisions of the ERA. **See Timmons v. Franklin Electric Coop.**, SWD-2 (ARB 12/01/98).

This Administrative Law Judge also finds that Respondent's failure to follow its performance assessment policies is evidence of pretext. **See Van Der Meer v. Western Kentucky University**, 95-ERA-38 (ARB 04/10/98)(evidence of improper motivation on the part of Respondent was established by, **inter alia**, its failure to follow a well-established policy of informal resolution of faculty grievances) AM 109.29 states that a "departing supervisor should conduct a performance assessment with an employee

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when there is a change of supervision." Mr. Derkacs did prepare a performance assessment for Complainant when he left his position as group leader, however, that performance assessment was not conducted with Complainant. (RX S)

Mr. Loud failed to adhere to the Administrative Manual when he included his August 27, 1997 note in Complainant's performance assessment. Although Mr. Loud suggested to Complainant that the note would be added to the performance assessment (TR 158), Complainant sent Mr. Loud an e-mail on September 8, 1997, raising his concerns about the note being included in the performance assessment. (TR 159-161; CX 18; EX L-1) When Complainant first saw his completed performance assessment in early 1998, he "got rather mad" because he had sent the e-mail to Mr. Loud regarding his reservations about the note being included. (TR 169-170) Ms. McCabe explained that it is mandatory that when an employer puts a comment in the performance assessment he has to inform the employee before it becomes part of the official performance assessment, because the

language of AM 109.204 requires that the employee and supervisor must read, discuss and sign the addendum. (TR 451-452; EX C-5) Complainant did not sign Mr. Loud's August 27, 1997 note which he made part of the performance assessment. (EX I-12)

Respondent also argues that Complainant's 2.75% pay raise was not made in retaliation for his protected activity, but was taken for a legitimate business reason and served a valid business purpose. (EX X at 37-44) Specifically, Respondent argues that it was merely trying to comply with salary review process as set out in AM 202. (EX X at 37-44) The policy of the salary determination, as set out in AM 202.32, is as follows:

> Salary increase decisions must reflect employee job performance, as documented in the performance assessment, relative to the employee's peer group performance; the relative importance of the employee's skill to the organization; the alignment of the employee's salary with the salaries of other employees making similar contributions; and the amount of the SIA available for each employment series in an organization. Individual salary increases are reviewed and approved by appropriate managers.

Where management has considerable discretion in personnel matters, there is a potential that management will use this discretion in a discriminatory fashion. **See Varnadore v. Oak Ridge National Laboratory**, 92-CAA-2, 5 and 93-CAA-1 (ALJ 06/07/93)(where the record indicated that management had considerable discretion in determining how excused absences are factored into a personnel appraisal, the ALJ concluded that there was substantial leeway for applying this factor in a discriminatory manner.)

The evidence of record

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establishes that Respondent had considerable discretion in determining pay raises for employees, and that such discretion was used to deny Complainant an adequate pay raise for fiscal year 1998. According to Mr. Segura, LANL's salary management philosophy is to provide the flexibility to managers to attract and retain the best possible workforce, and to reward behaviors and values that are critical to LANL's success. (TR 493) He explained that managers have flexibility within the guidance given by the Compensation Group. (TR 485) Specifically, managers have flexibility to place their people into peer groups as they see appropriate, and to determine raises based on salary alignment, performance and "those kinds of things." (TR 485)

Mr. Loud made his salary recommendation based on performance and job content, and he explained that the performance assessment weighed heavily in making the salary determination. (TR 1099-1101) Complainant's performance assessment contained the reference to "unfavorable customer feedback." (CX 14) As this comment reflects negatively on Complainant's performance, and as it was made in relation to his protected

activity, it is clear that the rate of Complainant's pay raise was based on his engaging in protected activity. I note that the only negative comment in Complainant's performance assessment is the one which relates to his protected activity.

According to Mr. Loud, job content was the "only objective differention between Complainant, Mr. Beckmann and Mr. Emerson. (TR 1103) Both Mr. Loud and Ms. Brittin indicated that Complainant's raise was based on his contribution to the organization. (TR 1058, 905) However, Complainant's job content was affected because he was taken off of assessments due to customer complaints. (TR 1106-1107) Thus, the rate of Complainant's pay raise was influenced by his engaging in protected activity. Mr. Loud explained that he never took into consideration that Complainant was not fully engaged during the assessment period, and that he considered all the team members to have similar job content. (TR 1113) However, if Complainant did not have work taken away from him, he would have had greater job content than that which was considered by Mr. Loud.

Respondent emphasizes that both Mr. Beckmann and Mr. Emerson were assessment team leaders during the applicable review period, while Complainant was not. (EX X at 40-44) As previously noted, Mr. Loud stated that job content was the "only objective differentiation" between Complainant, Mr. Beckmann and Mr. Emerson. (TR 1103) Although Complainant was not an assessment team leader during the applicable time period, he was the team leader for the revision of the Director's Policy. (TR 1152-1153) When Mr. Loud was questioned concerning Complainant's participation in this assignment, he stated that he did not recall what was being referred to. (TR 1163) Complainant, when not working on assessments, was obviously engaging in more than just "reviewing QA manuals and books". (TR 988) This Administrative Law Judge finds that Mr. Loud's attempt to minimize Complainant's role as team leader for the revision of the Director's Policy inescapably points to the conclusion that it was Complainant's protected activity, and not his job content, that determined his salary increase.

Accordingly, this Judge finds and concludes that the Respondent's stated reasons for including the comment in Complainant's performance assessment regarding "unfavorable customer feedback", and for awarding Complainant only a 2.75 percent pay raise in fiscal year 1998 are pretextual. Complainant has proven, by a preponderance of the

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evidence, that Respondent's true reason for these actions was in retaliation for Complainant's engaging in protected activity.

Complainant argued in the alternative that, if this matter was viewed as a dual motive case, Complainant would still prevail. (CX 40 at 20) This Judge only reaches the dual motive analysis if I determine there is a legitimacy to Respondent's stated reasons for the adverse employment action, a conclusion which I have specifically rejected for the aforementioned reasons.

Nevertheless, I note that the burdens of production and persuasion in whistleblower cases are governed by the statutorily delineated burdens of proof added by the 1992 amendments to the ERA. If a complainant successfully proves that his protected activity was a "contributing factor" to the adverse action, the respondent must then demonstrate "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior," 42 U.S.C. §5851(b)(3)(D). **Talbert v. Washington Public Power Supply Sys.**, 95-ERA- 35 (ARB 09/27/96). It is this Judge's reasoned conclusion that the Respondent has not presented clear and convincing evidence that it would have taken the same action if Complainant had not engaged in protected activity because the evidence establishes that Respondent's actions were made in response to Complainant's having raised safety and health concerns.

IV. Damages

This Judge, having found the Respondent in violation of the ERA, is required to issue a preliminary order, effective immediately, awarding affirmative action to abate the violation and attorney fees and costs. 29 C.F.R. Part 24.7(c)(2). **Overall v. Tennessee Valley Auth.**, 97-ERA-53 (ARB 04/27/98); **Varnadore v. Oak Ridge Nat'l Lab.**, 94-CAA-2/3 (Sec'y 09/11/95). This Judge must also issue a recommended order on the appropriate compensatory damages, if any. 29 C.F.R. Part 24.7(c)(1).

Complainant Gutierrez requests the complete expungement of the "negative comment" in his annual performance appraisal of August 8, 1997, as well as Mr. Loud's August 27, 1997 addendum (TR 195), a four percent increase in his annual salary retroactive to October 1, 1997[38] , plus interest, emotional distress damages in the amount of $15,000.00, reimbursement of vacation days lost in the course of litigating the claim (TR 196), and compensation of Complainant's reasonable time, attorney's fees and costs expended in pursuing the complaint. In his post- hearing request for relief, the Complainant also requested LANL's adoption of a new

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whistleblower policy that contains the following elements (CX 40):

> 1. A clear statement that Laboratory employees have the right to disclose public safety concerns to outside organizations, the media, and elected officials.
> 2. A three person panel with the authority to immediately and timely investigate any allegations of the Laboratory's violation of the whistleblower policy and the underlying public safety concerns. The panel will then make detailed findings on the basis of the investigation. The findings will be public. One member of the panel will be appointed by management, one member will be a non-supervisory Laboratory employee selected through a closed ballot election among all non-supervisory employees, and one member will be selected by the other two members.

> 3. The new policy will not supplant nor supercede other available whistleblower remedies.

The appropriate remedy in any given case is dictated by the violation for which the Respondent is found liable. In the present matter, this Judge has found that the Respondent violated the ERA by including the comment referring to "unfavorable customer feedback" in Complainant's performance assessment, and by awarding Complainant only a 2.75% pay increase for fiscal year 1998. Complainant may recover those damages which were caused by these actions.

Accordingly, this Administrative Law Judge finds that it would not be appropriate to require LANL to adopt a new whistleblower policy, as set forth in Complainant's post-hearing brief. (CX 40 at 41-42) The creation of such a remedy is beyond the authority of this Administrative Law Judge. 29 C.F.R. §24.7(c)(1). I note that pursuant to 29 C.F.R. §24.2(d)(1), every employer subject to the Act is required to

> ...prominently post and keep posted in any place of employment to which the employee protection provisions of the Act apply a fully legible copy of the notice prepared by the Occupational Safety and Health Administration, printed as appendix A to this part, or a notice approved by the Assistant Secretary for Occupational Safety and Health that contains substantially the same provisions and explains the employee protection provisions of the Act and the regulations in this part. ...

29 C.F.R. §24.2(d)(1)

Complainant seeks a four percent (4%) increase in his annual salary retroactive to October 1, 1997, plus interest from that date. (CX 40 at 41) Respondent argues that Complainant's 2.75% salary increase was based solely upon his job performance and job content, and therefore, Complainant is not entitled to the 4% pay increase. (EX Y at 5-12) In the alternative, Respondent argues that the maximum Complainant should receive is the difference between his actual pay increase, 2.75% and 3.38%, the highest pay increase in his comparable group. (EX Y at 12-13)

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y 10/30/91).

Complainant has the burden of establishing the amount of back pay that a respondent owes. **Pillow v. Bechtel Construction, Inc.**, 87-ERA-35 (Sec'y 07/19/93). However, uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. **McCafferty v. Centerior Energy**, 96-ERA-6 (ARB 09/24/97). Because back pay promotes the remedial statutory purpose of making whole

the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay, and "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party]." **EEOC v. Enterprise Ass'n Steamfitters Local No. 638**, 542 F.2d 579, 587 (2d Cir. 1976), **cert. denied**, 430 U.S. 911 (1977), **quoting Hairston v. McLean Trucking Co.**, 520 F.2d 226, 233 (4th Cir. 1975). **See NLRB v. Browne**, 890 F.2d 605, 608 (2d Cir. 1989)(once the plaintiff establishes the gross amount of back pay due, the burden shifts to the defendant to prove facts which would mitigate the liability). **Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.**, 91-ERA-13 (Sec'y 10/26/92), slip op. at 9-10)

This Administrative Law Judge finds that a 4% pay raise will restore Complainant to the same position he would have been in had he not been discriminated against.

For fiscal year 1998, Mr. Frostenson received four exceptional performances and a 5.31 percent pay increase (TR 331, 1048-1049; EX I-95; EX J-1), Mr. Geoffrion received four exceptional performances and a 4.09 percent pay increase (TR 331-332, 1050; EX I-69; EX J-1), Mr. Griffin received three exceptional performances and a 4.98 percent pay increase (TR 333, 1049; EX I-168; EX J-1), Mr. King received three exceptional performances and a 3.78 percent pay increase (TR 333-334, 1051-1052; EX I-121; EX J-1), Mr. Beckman received on exceptional performance and a 3.38 percent pay increase (TR 334, 1052- 1053; EX I-48; EX J-1), Mr. Emerson received one exceptional performance and a 3.19 percent pay increase (TR 334-335; EX I-148; EX J-1), and Mr. Gustafson received no exceptional performance and a 2.23 percent pay increase. (TR 335; EX I-27) Complainant received on exceptional performance and a 2.75 percent pay increase. (EX I; EX J-1)

According to Mr. Loud, he made his salary recommendation based on performance and job content, and the performance assessment weighed heavily in making the salary determination. (TR 1099-1101) Mr. Loud admitted that Complainant's job content had been affected, as Complainant had been taken off assessments because of customer complaints. (TR 1106-1107) He explained that he never took into consideration that Complainant was not fully engaged during the assessment period, and that he considered all the team members to have similar job content. (TR 1113) However, as previously held above, had Complainant not been taken off of assessment, his job content would then have been greater than that considered by Mr. Loud. Thus, Complainant's pay raise was lower than what it would have been had he not engaged in protected activity.

Mr. Loud stated that job content was the "only objective differentiation" between Complainant, Mr. Beckman and Mr. Emerson. (TR 1103) Mr. Loud agreed that one of the reasons he gave more money to Mr. Beckman was because he was the team leader of the management self-assessment. (TR 1103) However, Complainant did serve as the team leader for the revision of the Director's Policy, although this was not an assessment. (TR

1152-1153; EX I-9) Mr. Loud admitted that he did not recall what was being referred to where it was noted that Complainant served as the team leader for the revisions of the Director's Policy and the associated implementation documents. (TR 1163) Complainant was also assigned to represent Laboratory participation in the American Society of Mechanical Engineers Research and Development QA Group. (TR 1150) During the applicable assessment period, Complainant received his Master's degree in Business Administration Technology Management. (TR 350- 351; CX 30) Mr. Derkacs commented on Complainant's performance assessment that Complainant was the only subject matter expert in the group who supported the independent assessment program and participated in almost all of the AA-2 assessments requiring QA support. (EX S)

The record shows that Mr. Loud did not take into consideration all of Complainant's duties during the relevant assessment period, and that Complainant's pay raise was adversely impacted because he was kept off of assessments due to his engaging in protected activity. I find that a four percent pay raise will restore Complainant to the same position he would have been in had he not been discriminated against. Mr. Segura explained that for fiscal year 1998, the DOE authorized LANL to increase the technical staff member payroll by four percent. (TR 494) He further explained that the percentage increase for each individual could be much lower or much higher depending on their performance, job content and their salary alignment within their peer group. (TR 495) Given that the salary determination requires the weighing of several factors, and can not be reduced to a precise mathematical formulation, I find that Complainant is entitled to a four percent salary increase retroactive to October 1, 1997, plus interest.[39] Interest on a back pay award shall be paid at the rate specified in 26 U.S.C. §6621 until the date of compliance with the Secretary's order. **Sprague v. American Nuclear Resources, Inc.**, 92-ERA-37 (Sec'y 12/01/94).

Complainant has also requested reimbursement of vacation days lost in the course of litigating this claim. (TR 196) Such vacation days are recoverable, as they represent terms, conditions and privileges of employment. **See** 42 U.S.C. § 5851. Complainant testified that he lost a number of vacation days, although he failed to identify how many vacation days were lost. (TR 196) However, as the formal hearing in this matter lasted five days, this Administrative Law Judge finds that Complainant is entitled to reimbursement of five vacation days.

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment and humiliation. **See Generally DeFord v. Secretary of Labor**, 700 F.2d 281, 283 (6th Cir. 1983)(decided pursuant to the ERA); **Nolan v. AC Express**, 92-STA-37 (Sec'y 01/17/95)(decided pursuant to an analogous provision of the STA). Where appropriate, a complainant may recover an award for emotional distress when his

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or her mental anguish is the proximate result of respondent's unlawful discriminatory conduct. **See Bigham v. Guaranteed Overnight Delivery**, 95-STA-37 (ALJ

05/08/96)(adopted by ARB 09/05/96); **Crow v. Noble Roman's Inc.**, 95-CAA-8 (Sec'y 02/26/96). **See Also Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y 10/31/91). Complainant bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB 09/29/98); **Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92).

It is appropriate to review awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in a whistleblower case. Accordingly, this is precisely what this Judge has done. **See Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB 08/27/98)(wherein the Board reduced the ALJ's recommendation of $100,000 in compensatory damages to $20,000)[40] ; **Doyle v. Hydro Nuclear Services**, 89-ERA-22 (ARB 09/06/96)(wherein the Board affirmed the ALJ's recommendation of $40,000 compensatory damages)[41] ; **Bingham**, **supra** (wherein the Board increased the ALJ's award of compensatory damages from $2,500 to $20,000 after reviewing the observations and accounts of complainant's emotional distress)[42] ; **Gaballa v. Atlantic Group, Inc.**, 94-ERA-9 (Sec'y 01/18/96)(wherein the Secretary reduced the ALJ's recommended compensatory damage award from $75,000 to $25,000)[43] **;** **Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92)(wherein the Secretary reduced the compensatory award from a recommended amount of $20,000 to $10,000)[44] ; **McCuistion v. Tennessee Valley Auth**., 89-ERA-6 (Sec'y 11/13/91)(wherein the Secretary increased compensatory damages from the ALJ's recommended award of to $10,000)[45] ; **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (08/16/93)(wherein the Secretary reduced the ALJ's recommended award of compensatory damages to $5,000).[46]

In **Van Der Meer, supra**, the complainant suffered little out-of- pocket loss: he lost no salary as a result of the leave of absence and there was no evidence of uncompensated medical costs. Other losses were non-quantifiable. The complainant was awarded, however, $40,000 in compensatory damages because the respondent took the extraordinary and very public action against the complainant which surely had a negative impact on complainant's reputation among the students, faculty and staff at the school, and more generally in the local community; complainant was subjected to additional stress by the respondent's failure to follow the conciliatory procedures in its handbook and complainant testified that he felt humiliated.

[Page 48P> The Complainant testified that in the past year he was registering high blood pressure, a condition which he never had before. (TR 198) He stated that he has had to go back to LANL's onsite occupational medical facility three times to check his high blood pressure, and one time for his annual checkup. (TR 317) According to Complainant, his physician gave him indications that he was perhaps under stress. (TR 199) Complainant explained that there has been a great loss of time away from his family, and that his family has suffered emotional distress out of fear that his career would suffer.[47] (TR 381) At the formal hearing, Complainant presented himself as a dedicated employee who became frustrated and distressed over Respondent's unwillingness to address the safety and quality control issues he identified. Based on the

foregoing, this Judge recommends a compensatory damage award in the amount of $15,000.00.[48]

Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with his complaint. 42 U.S.C. §5821(b)(2)(B). Complainant did not submit an itemization of costs and expenses incurred in connection with his complaint. Moreover, Complainant's attorney did not submit a fee petition detailing the work performed, the time spent on such work, and the hourly rates of those performing the work.

The Rules of Practice and Procedure before the Office of Administrative law Judges allow the administrative law judge to make part of the record any motion for attorney fees authorized by statute, any supporting documentation, and any determinations thereon. 29 C.F.R. §18.54(c). Accordingly, Complainant shall, within twenty (20) days from receipt of this Recommended Decision and Order, file and serve a fully supported application for costs and expenses including attorney fees. Thereafter, Respondent shall have ten (10) days from receipt of the application in which to file a response.

V. RECOMMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, this Judge **RECOMMENDS** the following **PRELIMINARY ORDER**:

> (1) (1) Respondent shall provide Complainant with a four percent (4%) salary increase retroactive to October 1, 1997, plus interest from that date. Interest shall be calculated pursuant to 26 U.S.C. §6621.
> (2) Respondent shall reimburse Complainant with five vacation days.
> (3) Respondent shall immediately expunge Complainant's performance assessment of the second paragraph in the comments section, which references "unfavorable customer feedback". Respondent shall also immediately expunge Complainant's performance assessment of Mr. Loud's August 27, 1997 note.

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> (4) Respondent shall pay Complainant compensatory damages in the amount of $15,000.00.

It is **FURTHER RECOMMENDED** that:

> (5) Complainant shall, within twenty (20) days from receipt of this Recommended Decision and Order, file and serve a fully supported application for costs and expenses including attorney fees. Thereafter, Respondent shall, within ten (10) days from receipt of the application, file a response.

DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts

DWD:jgg

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board; U.S. Department of Labor; Frances Perkins Building; Room S-4309; 200 Constitution Avenue, N.W.; Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten (10) business days of the date of this Recommended Decision and Order and shall be served on all parties and on the Chief Administrative Law Judge. **See** 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

[1]On January 5, 1999, the second day of hearings in this matter, S.R. Skaggs, Ph.D., a former Armor Program Manager at the Los Alamos National Laboratory, faxed a letter to the Office of the Clerk, United States District Court for the District of New Mexico. (ALJ EX 19) Counsel for both parties indicated that they did not solicit the letter in any way. This Administrative Law Judge held that the **ex parte** communication would not be considered as Dr. Skaggs was not identified by either side as a witness, the unsubstantiated allegations made in the letter were not subject to any corroborating evidence, and because neither counsel had the opportunity to cross-examine the author. (TR 385-388)

[2]A "murder board" is a process by which documentation is reviewed in order to determine if it is something of value. (TR 581)

[3]Victoria McCabe, the Office Leader of the Human Resources Policy and Communication Office at LANL, stated that there is no Laboratory-wide policy contained in the administrative process requiring that a particular document has to be stamped "confidential" or "for internal use", although documents that are intended to be kept confidential are generally labeled as such. (TR 453) She explained that there are policies related to document control that are not contained in the administrative manual and are not the province of her office, classified documents being one of them. (TR 453)

[4]Accidents included people getting shocked on electrical wires while cutting through walls and floors, items being lifted were being dropped and damaged, people were getting injured and maimed as a result of using equipment inappropriately, there was a shooting at the guards, and one of the guards was accidentally killed. (TR 75)

[5]Mr. Derkacs is presently employed as a technical staff member in ESH-5, deployed in NIS Facility Management Unit 75. (EX W at 4)

[6]In Laboratory parlance, the individuals, directors, deputy directors and group leaders of the programs to be assessed are referred to as "customers." (TR 172)

[7]Ms. Brittin stated that Complainant was given a two percent raise in 1996 because of delays in completing the BUS assessment, and she indicated that Mr. Derkacs recommended the raise. (TR 864) She explained that the raise process involves the management team examining to make sure the raises are equitable across the board. (TR 864) She further explained the management team, comprised of the AA group leaders, would look at the LANL policy and the salary guidelines, and then look at the contribution of the employee to the organization. (TR 865) The employee's contribution would be based on the performance appraisal and the employee's contribution with respect to the others in the group. (TR 865) Ms. Brittin had no concerns that Complainant's raise reflected anything other than his contributions. (TR 866)

[8]Complainant addressed Ms. Brittin's comments in a matrix dated April 22, 1996, and in a memo to her dated May 7, 1996. (TR 937-943; CX 36; CX 37)

[9]Mr. Frostenson stated that all of the team leaders and assessors have spoken of frustration in Ms. Brittin's level of detail that she takes with employees. (TR 802) However, he also stated that delays in processing reports were not caused by management with the intent to delay publications or protect disclosure of sensitive information. (TR 738) Mr. Derkacs explained that Ms. Brittin's management style was that of a "more observant monitor." (EX W at 32) Mr. King explained that Ms. Brittin "nitpicks a little bit", but that such "nitpicking" does not result in watered down findings. (TR 605) Mr. Griffin stated that there have been significant delays in Ms. Brittin responding to reports given to her. (TR 548) However, he did not believe that she kept reports so that sensitive findings would not be released, nor did he believe her comments "water[ed] down" his reports. (TR 549)

Ms. Brittin explained that, while she now reviews all of the assessment reports to be published by AA-2, initially she did not. (TR 838) She changed her practice in late 1994 when she got a letter from a customer which criticized the quality and value of the inspections. (TR 839) Ms. Brittin stated that she did not delay the BUS assessment report to cover up issues, nor did she change Complainant's report so that the findings were substantially changed. (TR 966-967) She believed she strengthened the report by highlighting the findings. (TR 967)

[10]Mr. Le Doux received a copy of Complainant's March 22, 1996 memo to Mr. Derkacs. (TR 88, 467; CX 2; CX 3)

[11]Complainant testified that he never heard back from Mr. Le Doux regarding his concerns. (TR 85)

[12]Tritium is a material that is utilized in nuclear bombs. (TR 127)

[13]CCNS is a non-profit public education organization which focuses on nuclear safety issues. (TR 390) CCNS brought suit in the United States District Court for the District of New Mexico against the United States Department of Energy and Siegfried S. Hecker. (CX 31) The suit was brought to remedy violations of the Clean Air Act by Los Alamos

National Laboratory. (CX 31) On April 2, 1996, Senior Judge Edwin Mechem granted in part and denied in part, CCNS's Motion for Partial Summary Judgement. (CX 31)

[14]Complainant does not seek any damages based on his fiscal year 1997 salary increase. (CX 40 at 41)

[15]AM 721.01 states as follow:

> An employee may not use proprietary data or privileged information obtained through Laboratory employment for personal purposes, for favoritism in the purchase of goods or services, **or in any unauthorized manner**. *For example, see AM 1002.20.* Such information must be held in confidence until it is released through the proper channels to **Laboratory employees**, to the public, or to potential vendors. *See AM 707 and AM 1002.63*.

[16]According to Mr. Griffin, the assessment team was denied access because an experiment was being conducted, but they were told to come back later that afternoon or the next day. (TR 564) Because of the shortness of the assessment, Mr. Griffin did not elect to go into that area, although Mr. Kruse and Mr. King did go into that area. (TR 564)

[17]AM 707.01 states as follows:

> Employees must obtain approval from the Public Affairs Office before releasing any news item or official statements concerning the Laboratory or before releasing any Laboratory materials for commercial electronic or printed purposes.

[18]Although the article in the *Santa Fe New Mexican* uses the term "inspectors", Complainant stated that he used the term "assessors." (TR 228)

[19]WIPP is the Waste Isolation Pilot Plant. (TR 640)

[20]Complainant stated that he had no knowledge that the *Santa Fe Reporter* would have a copy of his October 7, 1996 statement. (TR 257)

[21]Mr. Carathers passed away prior to commencement of the hearing in this matter. (EX X at 8)

[22]Mr. Griffin's time frame is questionable, as the article in the *Santa Fe New Mexican* was not published until October 28, 1996. (CX 10; EX E)

[23]Mr. Griffin explained that he received higher priority requirements from the operations working group and the Director's Office to conduct assessments not related to the QA programs at WIPP, so there was no longer an issue on this point. (TR 543)

[24]Complainant stated that, during the review period, he was assigned to represent Laboratory participation in the American Society of Mechanical Engineers Research and Development QA Group. (TR 1150) He was also the team leader for the revision of the Director's Policy, although this was not an assessment. (TR 1152-1153)

[25]There are four major job series at LANL: technical staff members, technicians, office support and general support people, and specialist staff members which are the administrative exempt employees. (TR 484)

[26]Mr. Derkacs, who was group leader from June 1, 1996 through March 7, 1997, prepared an interim performance assessment. (TR 999-1000; EX S) Mr. Derkacs gave Complainant the same ratings in the "Evaluation Matrix" as did Mr. Loud. (EX S; CX 14) Mr. Loud explained that he did not change the ratings given by Mr. Derkacs because he felt that it was "more appropriate" to use Mr. Derkacs' ratings since the predominance of Complainant's activities were his responsibility. (TR 1010-1011) Mr. Derkacs' interim performance assessment also contained the following comment, which Mr. Loud replaced with his own comment (EX S):

> Joe is a subject matter [expert?] in QA, a lead QA auditor, an active member of several professional societies and very knowledgeable of QA requirements and applications. He was the only QA subject matter expert in the group who supported the independent assessment program and consequently participated in almost all of the AA-2 assessment requiring QA support.

[27]Complainant took issue with the statement that the CCNS lawsuit was never raised at the performance appraisal meeting. (TR 302)

[28]Mr. Loud later explained that if he stated that Complainant had no legal right to go to the media, he misspoke. (TR 1086) He stated that "anybody's got a legal right to go to the media", but that as a supervisor, he feels that he has a right to ensure that his organization is run as effectively as possible. (TR 1086)

[29]Lee D'Anna made the salary recommendation for Mr. Gustafson, as Mr. Gustafson was part of the AA-1 group. (TR 894-895; EX J-1)

[30]Mr. Frostenson received four exceptional performances and a 5.31 percent pay increase. (TR 331, 1048-1049; EX I-95; EX J-1) Mr. Geoffrion received four exceptional performances and a 4.09 percent pay increase. (TR 331-332, 1050; EX I-69; EX J-1) Mr. Griffin received three exceptional performances and a 4.98 percent pay increase. (TR 333, 1049; EX I-168; EX J-1) Mr. King received three exceptional performances and a 3.78 percent pay increase. (TR 333- 334, 1051-1052; EX I-121; EX J-1) Mr. Beckmann received on exceptional performance and a 3.38 percent pay increase. (TR 334, 1052-1053; EX I-48; EX J-1) Mr. Emerson received one exceptional performance and a 3.19 percent pay increase. (TR 334-335; EX I-148; EX J-1) Mr. Gustafson received no exceptional performance and a 2.23 percent pay increase. (TR 335; EX I-27)

Complainant received one exceptional performance and a 2.75 percent pay increase. (EX I; EX J-1)

[31]Mr. Loud was not sure if he told Complainant that he was going to include the note dated August 27, 1997, in Complainant's performance assessment, although he explained that it was not his intent to hide the fact that it was being included. (TR 1091-1092)

[32]Ms. McCabe explained that it is mandatory that when a supervisor puts a comment in a performance appraisal he has to inform the employee before it becomes part of the official performance appraisal, because the language of AM 109 states that the employee and supervisor must read, discuss and sign. (TR 451-452; EX C-5)

[33]Complainant stated that for the last five years, he has been involved in litigation over personnel issues, in particular, a 1995 reduction in force. (TR 371) He explained that, while researching in connection with that case, he found that managers were using negative comments, such as the one given to him to lay people off without consideration as to their merit, performance or other factors which should have been taken into account. (TR 371) According to Complainant, right before the reduction in force, some employees who had exceptional performance were given a negative comment so they could use that as an excuse to put that individual on the list for a reduction in force. (TR 371- 372)

[34]Mr. Loud did not change the ratings given by Mr. Derkacs because he felt that it was "more appropriate" to use Mr. Derkacs' ratings since the predominance of Complainant's activities were his [Mr. Derkacs'] responsibility. (TR 1010-1011)

[35]Ms. Brittin explained that she did not discuss the article in the *Santa Fe Reporter* with Complainant because she was away from the Laboratory much of the time on personal matters from September of 1996 through May of 1997. (TR 883) However, Ms. Brittin was not away for this entire period, and she admitted that she did not instruct any subordinate to speak with Complainant while she was away. (TR 952)

[36]I note that the "Comments" section of an Employee Performance Assessment is only required to be filled out where the employee receives an "Exceptional Performance", "Performance needs improvement", or "Unsatisfactory Performance". (CX 14) Complainant received one "Exceptional Performance", and Mr. Loud included a paragraph explaining that rating. (CX 14) Mr. Loud's second comment, regarding to "unfavorable customer feedback", was not related to any finding of "Exceptional Performance", "Performance Needs Improvement", or "Unsatisfactory Performance". Mr. Loud admitted that the second comment was not required and it could give the impression that Complainant's performance needed improvement, although that was not his intent. (TR 1077)

[37]Ms. McCabe explained that there is no Laboratory-wide policy contained in the administrative process requiring that a particular document has to be stamped "confidential" or "for internal use", although documents that are intended to be kept confidential are generally labeled as such. (TR 453) She further explained that there are

policies related to document control that are not contained in the administrative manual and are not the province of her office, classified documents being one of them. (TR 453)

[38]Complainant did not make any complaints about his fiscal year 1997 raise, as he understood it to be an alignment to bring some of the individuals in the group in line with the rest. (TR 287-288)

[39]I note that a four percent pay increase is greater than the pay increases received by Mr. Beckman and Mr. Emerson, each of whom were team leaders and, and like Complainant, received one exceptional performance. However, such a result is necessitated because Complainant's pay increase was adversely affected by his engaging in protected activity. Such a disparity is not unheard of under LANL's salary review process. For example, Mr. Griffin received three exceptional performances and a 4.98% pay raise (TR 333, 1049; EX I-168; EX J-1), while Mr. Geoffrion received four exceptional performances and only a 4.09 percent pay raise. (TR 331-332, 1050; EX I-69; EX J-1)

[40]The evidence established that the discriminatory conduct was limited to several cartoons lampooning complainant, complainant did not suffer loss of a job or blacklisting and did not incur financial losses, and evidence of mental and emotional injury was limited to his own testimony and that of his wife.

[41]The evidence which supported an award in this amount consisted of complainant consulting physicians who prescribed anxiety and depression medications, as well as other medications for chest pain; a treating psychologist testified that respondent's discriminatory acts caused complainant's anxiety disorder and post-traumatic stress disorder and respondent failed to offer any countervailing evidence on causation; and that same psychologist testified complainant's wife and children noticed a radical change in complainant's behavior, a serious strain in the marital relationship, and that divorce proceedings were begun, although the couple did eventually reconcile.

[42]At hearing, complainant testified to his lowered self-esteem and uncommunicativeness, to his change in sleep and eating habits, and to the adverse effect on his marriage. He also testified that he was not interested in socializing, felt 'less than a man' because he could not support his family, and that the family experienced a sparse Christmas. Finally, complainant testified that the family had to cancel their annual summer vacation and charge the credit cards to the limit. Complainant's wife testified she noticed complainant's withdrawal in the weeks after Christmas.

[43]The ALJ recommended a $75,000 compensatory damage award based on the treating psychologist's finding that complainant suffered from chronic stress, paranoid thinking, a general distrust of others, a lack of confidence in his engineering judgment, a fear of continuing repercussions, and a general feeling of apathy. The psychologist further testified complainant will forever suffer from a full-blown personality disorder and a permanent strain on his marital relationship. The Secretary reduced the award based on the fact that the same psychologist indicated this psychological state was caused in part

by a co-respondent who had previously settled out of the case and that part of the settlement compensated for part of complainant's compensatory damages.

[44]In **Lederhaus**, the evidence established complainant remained unemployed for 5 1/2 months after his termination, he was harassed by bill collectors, foreclosure was begun on his home and he was forced to borrow $25,000 to save the house. In addition, complainant's wife received calls at work from bill collectors and her employer threatened to lay her off. Complainant had to borrow gas money to get to an unemployment hearing and experienced feelings of depression and anger. Complainant fought with his wife and would not attend her birthday party because he was ashamed he could not by her a gift, the family did not have their Christmas dinner, and complainant would not go to visit his grandson. In fact, complainant cut off almost all contact with his grandson. The evidence revealed complainant became difficult to deal with and this was corroborated by testimony from complainant's wife and neighbor. Complainant contemplated suicide twice.

[45]The evidence revealed the complainant was harassed, blacklisted, and fired. In addition, complainant lost his livelihood, he could not find another job, and he forfeited his life, dental and health insurance. The blacklisting and termination exacerbated complainant's pre-existing hypertension and caused frequent stomach problems necessitating treatment, medication, and emergency room admission on at least one occasion. Complainant experienced problems sleeping at night, exhaustion, depression and anxiety. Complainant introduced into evidence medical documentation of symptoms, including blood pressure, stomach problems, and anxiety. Complainant's wife corroborated his complaints of sleeplessness and testified he became easily upset, withdrawn, and obsessive about his blood pressure.

[46]The testimony of complainant, his wife, and his dad established complainant was of the opinion that firing someone was like saying that person is no good. The evidence also established complainant felt really in a low and that he relied on his dad to come out of depression. The termination affected complainant's self-image and impacted his behavior, which became short with his wife. The wife testified to the stress and emotional strain on the marital relationship and the father testified to complainant's pride and work ethic and the fact that complainant felt sorry for himself after the termination.

[47]Complainant identified his family as his wife, Bertha, and his in-laws. (TR 382)

[48]I note that, although Complainant explained that his family has suffered emotional distress out of fear that his career would suffer (TR 381), no part of the recommended award is based on this consideration. Complainant is entitled to compensatory damages as a result of his own emotional distress, but the ERA does not provide for the awarding of compensatory damages to the family of a complainant. 42 U.S.C. §5851(b)(2)(B).